**TERRY’S TAKES**

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

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**October 31-November 4, 2022**

**Supreme Court of the United States**

NOTE: There are no SCOTUS opinions yet for this term. That said, two companion cases were argued on the issue of whether colleges and universities can consider race as a factor in admissions in order to pursue the goal of a racially diverse student body. Observers generally expect that the Supreme Court will hold that race can no longer be a factor considered in admissions. While this sounds like another example of overruling a major constitutional precedent, conservatives have correctly noted that when deciding Grutter v. Bollinger in 2003, Justice O’Connor’s opinion expressly stated that the court was allowing this to go on for a limited time, as O’Connor fully expected that all would be right in the world and we’d be living in a post-racial country in another 25 years or so in light of the strides we’d made on civil rights issues in the preceding 25 or 50 years. So…yeah…. anyhoo, the full audio of the arguments are available as podcasts online, and a full rundown of one of the arguments is here:

<https://www.scotusblog.com/2022/10/affirmative-action-appears-in-jeopardy-after-marathon-arguments/>

**Eleventh Circuit**

Marjorie Taylor Greene v. Secretary of State for the State of Georgia, Charles R. Beaudrot, et, al—(Per Curiam by Wilson, Branch, and Lagoa; 11th Cir. 11/3/22). This is, of course, not a personal injury case, but it’s newsworthy. Marjorie Taylor Greene is the polarizing and controversial Congresswoman from Georgia’s 14th Congressional District. Following the events of the January 6, 2021, attack on the Capitol Building in Washington D.C. by supporters of President Trump, a group of voters filed a lawsuit attempting to bar Marjorie Taylor Greene from running for office based on her vocal support of the January 6 participants. Section 3 of the Fourteenth Amendment provides that “[n]o person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.” The group of voters challenged her under GA Code § 21-2-5 (2020), which similarly allows candidates to be barred from running for office if they do not meet legal qualifications. A state administrative law judge (“ALJ”) heard the challenge and found that the voters presented insufficient evidence that Rep. Greene had engaged in insurrection. The Georgia Secretary of State adopted those conclusions. The group of voters then petitioned for judicial review in the Superior Court of Fulton County, but the Secretary of State’s decision was affirmed. The voters attempted to take the matter to the Supreme Court of Georgia, but that court denied discretionary review. While the state case was proceedings, Rep. Greene filed a motion in the Northern District Court of Georgia seeking an injunction regarding the case, arguing that state officials lacked power to adjudicate her eligibility to run for office. The district court denied the injunction, and Rep. Greene appealed. While the appeal was pending, however, the state proceeding came to an end. Because Rep. Greene’s state case had concluded and she had prevailed in the case, there was no active controversy. The court remanded the case to the district court with instructions to dismiss the case as moot. JUDGE BRANCH CONCURRED SPECIALLY, writing a 14-page opinion about how the merits of Rep. Greene’s case were strong enough that had the case not been moot, the court should have reversed and remanded to grant the injunction because the state lacked authority to judge the qualifications of a candidate for Congress.

<https://media.ca11.uscourts.gov/opinions/pub/files/202211299.pdf>

United States of America v. F.E.B. Corp.—(J. Rosenbaum; 11th Cir.; 11/1/22). I’m not going to summarize this opinion. History buffs, however, should check it out. It begins this way: “A small island lies just off Key West, Florida. It was not born in the usual way. No volcanic lava plumes rose from the sea and created it. Rather, about a hundred years ago, the United States labored to dredge oceanic soil from Key West Harbor, which it piled up on the ocean floor. Later, during World War II, the United States conducted further dredging operations in the area and again dumped the soil it collected in the same area in Key West Harbor. At some point during these operations, Wisteria Island was born.” The case is about whether the USA or Florida owns the island, but there’s a whole rundown of the history of Florida and the island itself that makes for interesting reading if…you know…you’re interested in Florida history.

<https://media.ca11.uscourts.gov/opinions/pub/files/202014047.pdf>

**First DCA**

Stabler v. Spicer—(Per Curiam; 1DCA; 11/2/22). This is not a personal injury opinion, but it’s a significant case in the canon of LGBTQ+ family law cases. Two lesbians lived together in a committed relationship, but they did not marry. Because they desired to have a child, Spicer’s brother impregnated Stabler. A few years later, the couple agreed to have another child together, and a family friend impregnated Stabler. (So both children were the biological child of Stabler, not Spicer). The two subsequently broke up and started litigation about custody and visitation rights. While Stabler agreed to custody and/or visitation rights for Spicer at a mediation, she later regretted the agreement and challenged the mediation agreement (and order adopting the agreement) as unconstitutional in light of Florida’s constitutional right to privacy and the fact that she was the biological mother and Spicer had never been a legal spouse and had never legally adopted the children. The DCA then echoed the trial court’s language imploring both women to place the children’s interests above their own, but then stated that “the dispositive question in this case—as the trial court recognized—is a legal one: does Spicer—as a nonparent—have a legally enforceable right to have visitation rights with either of the children under Florida law? The answer is no.” She is considered a non-parent. The court refused to find any waiver of the constitutional right based on the mediation agreement. Judges Lewis, Makar, and Bilbrey concurred in the opinion. (NOTE: For court-watchers, this was as liberal a panel as one could hope for from the First DCA. While the opinion can be read as anti-gay-rights, admittedly, Spicer did not give them much to work with by failing to marry Spicer or adopt the children. She was legally simply a girlfriend and biologically an aunt of one of the children.)

<https://www.floridasupremecourt.org/content/download/852213/opinion/211826_DC13_11022022_140111_i.pdf>

Talley et al v. Consolidated Respondents IN Re: Heekin/St. Vincent’s Litigation—(J. Winokur; 1DCA; 11/2/22). Several former patients of Dr. Keekin and St. Vincent’s Medical Center brought claims for medical malpractice against the doctor and vicarious liability for St. Vincent’s. The patients sought to obtain discovery from non-party employees of St. Vincent’s. Specifically, they sought to obtain the employees’ text messages about Dr. Heekin’s purportedly impaired behavior at work. The employees sought a protective order, arguing that texts on their personal cell phones were private and not discoverable. The lower court reserved on that question and asked the employees to submit a privacy/privilege log of challenged texts. The employees then moved to modify the trial court’s discovery order to excuse them from submitting a privacy log, arguing that the claim did not revolve around the content of any particular message; it was just a blanket claim that all their texts were protected by privacy rights. They then submitted a privacy log omitting thousands of pages of texts and images concerning Dr. Heekin. They also submitted a privilege log alleging 20 specific messages were protected by various privileges and protections. The employees then filed another motion for protective order reiterating the same arguments about privacy generally protecting all of their texts and making arguments about the time and expense involved in complying with the discovery order. The patients responded that there was no special privacy interest for texts. The trial court denied the motion for protective order because the employees failed to demonstrate a privacy right. The patients showed a compelling need because the employees had claimed that they had forgotten what they observed on various dates. There was no showing of undue burden or cost. The employees filed a petition for certiorari with the DCA. Judge Winokur recited the well-worn test for cert relief. A petitioner must show that the discovery order being challenged (1) departed from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be remedied on direct appeal. First, the DCA addressed the privacy right in question. “Every person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein.” Art. I, § 23, Fla. Const., but that right is not absolute. In litigation, information is generally discoverable unless privileged. An actual privacy right can give rise to irreparable harm, and the DCA found that the employees succeeded in demonstrating that private text messages could result in irreparable harm that could not be remedied on appeal if the discovery is improper. In interpreting the Florida Constitutional right to privacy, Judge Winokur immediately resorted to the test under Fla. R. Civ. P. 1.280(c), which provides that a protective order is available to protect someone from “annoyance, embarrassment, oppression, or undue burden or expense.” He added, however, that the constitutional right also required balancing the need for discovery with the affected privacy interests. Here, the texts are relevant. They concern the doctor’s behavior and alleged impairment at work. Aside from asserting the principle of privacy, the employees failed to show any private information that would be compromised such as confidential medial information. The patients did not seek unfettered access to the cell phones; the order was narrowly tailored to seek information relevant to the litigation. Further, the employees failed the “clearly established law” portion of the test, because cert review “should not be used to create new law where the law at issue is not clearly established,” and no Florida court had ever recognized an absolute right of privacy in text messages. The employees also failed to show a departure from the essential requirements of clearly established law regarding the trial court’s refusal to seal the disclosures, as no right to blanket confidentiality exists. The texts are not a trade secret. There is no statutory protection for text messages. While Petitioners argued that rule 2.420(c)(9) and 2.420(e) of the Florida Rules of Judicial Administration required sealing the discovery responses, there is a procedure for requesting relief under that rule, and the employees did not follow that procedure. The petition was denied.

<https://www.floridasupremecourt.org/content/download/852214/opinion/213685_DC02_11022022_140347_i.pdf>

**Third DCA**

Morrison v. Z Roofing & Waterproofing, Inc.—(Per Curiam; 3DCA; 11/2/22). This is a weird little opinion where Morrison filed four responsive pleadings, the trial court ruled on none of them, and then the trial court entered a default judgment against Morrison. He moved to vacate the default, but the trial court denied the motion. He appealed. On appeal, Z Roofing argued that the default was valid because the four responsive pleadings were somehow insufficient. The four responsive pleadings are not described in the opinion, but based on other language in the opinion at least one of the four appears to have been styled as an answer to the complaint. The DCA rejected the argument that it could affirm because the responsive pleadings were legally insufficient, holding instead that because the lower court never found the pleadings insufficient and never struck Morrison’s pleadings, it was error to enter the default because the trial court was without the authority to enter a default and certainly had no basis to enter a default final judgment while responsive pleadings were pending. Reversed.

<https://www.floridasupremecourt.org/content/download/852188/opinion/220720_DC13_11022022_101935_i.pdf>

**Fourth DCA**

Deshommes v. Exalant—(Per Curiam Gross Damoorgian and Forst; 4DCA; 11/2/22). Well, we finally have a Florida opinion about jurors wearing masks to prevent the transmission of disease. Citing Michigan and Florida federal cases, this citation PCA states, in its entirety:

Affirmed. See United States v. Schwartz, No. 19-20451, 2021 WL 5283948, at \*2 (E.D. Mich. Nov. 12, 2021)(“All courts that have considered this question so far have universally reached the conclusion that a defendant can still assess a juror’s credibility and demeanor during both voir dire and trial while the juror is wearing a face mask.”); United States v. Trimarco, No. 17-CR-583 (JMA), 2020 WL 5211051, at \*1, \*5 (E.D.N.Y. Sept. 1, 2020)(denying a motion for continuance “until some indeterminate time in the future” when safety measures ordered in response to the COVID-19 pandemic are lifted, and agreeing with the government that “there is no constitutional right that requires a defendant to see a juror’s facial expression or allows him to communicate nonverbally with a juror.”).

<https://www.floridasupremecourt.org/content/download/852201/opinion/220513_DC05_11022022_100703_i.pdf>

Hansen v. MDLV, LLC et al—(J. Damoorgian; 4DCA; 11/2/22). This is another appeal of an order denying a motion to vacate a default judgment. Though it’s a contract case, not a personal injury case, the holding is applicable to all civil practice. The underlying action arose out of a dispute over the parties’ respective claims to a deposit that the Buyer tendered under the terms of a real estate contract. The Buyer filed an answer to the interpleader action and a crossclaim against the Seller seeking a return of his deposit. The Sellers sought an extension of time to respond. The parties engaged in significant communication on discovery issues. The Sellers moved to dismiss the Buyer’s crossclaim, and the trial court granted the motion, dismissing it with leave to amend. The Buyer timely served his amended crossclaim. Sellers failed to file a motion or responsive pleading to the amended crossclaim, and after 29 days, the Buyer moved for a judicial default under Rule 1.500(b), Fla. R. Civ. P. Three hours later, the trial court granted the default. On the following day, the Buyer filed and served a motion for entry of a default final judgment. An hour later, Sellers filed a verified motion to set aside the judicial default. Without ruling on that motion, the trial court entered the default judgment the same day. At some point, however, the judge held a hearing on the motion to set aside the default, with the attorney arguing that he failed to timely respond due to excusable mistake in the form of miscalendaring the deadline. The Sellers also argued that because they had participated in litigation, they were entitled to a hearing before entry of the judicial default and the default final judgment. The trial court denied the motion to vacate, allowing the default judgment to stand. On appeal, the DCA agreed that because the Sellers had participated in litigation, the judge had erred in entering a judicial default without a hearing. Thus, the resulting final judgment was void, meaning that the subsequent hearing on whether to vacate the default final judgment did not cure the failure to hold a hearing prior to entering the judicial default order. Rule 1.500(b) states that where a party has filed or served ANY DOCUMENT in the action, that party MUST be served with NOTICE of the application for default. A Fourth DCA opinion had clarified that “any document” meant “any SUBSTANTIVE PAPERS,” which essentially means that a mere notice of appearance won’t be counted as “any document” at least in the Fourth DCA. But in this case, the Sellers filed a motion to dismiss the Buyer’s original crossclaim, and they had engaged in significant communication with the Buyers on pretrial and discovery matters. (NOTE: This could have easily gone the other way, right? While the Sellers filed a motion to dismiss the **original** crossclaim, that crossclaim was dismissed. When the amended crossclaim was filed, the Sellers filed nothing in response to the amended crossclaim. One wonders how the motion to dismiss was still “substantive” at that point. And communications about pretrial matters does not constitute filing a “document” or “substantive paper.” But the Fourth DCA held that the Seller’s participation in the case was significant enough that they were entitled to a notice of hearing on the motion for judicial default).

<https://www.floridasupremecourt.org/content/download/852200/opinion/220397_DC13_11022022_100515_i.pdf>

Harrell v. BMS Partners, LLC, d/b/a Broward Motorsports—(J. Damoorgian; 4DCA; 11/2/22). This is a major opinion stating essentially that any defendant in the stream of commerce (here, a dealership that sells but does not manufacture Sukuzi motorcycles) cannot contact away their liability for strict products liability claims because Florida’s public policy forbids it. Harrell purchased a Suzuki motorcycle from Broward Motorsports (“Seller”). The sales contract contained a clause wherein Harrell agreed to release the seller from any liability for personal injury or death arising from negligence or gross negligence of the Seller and any negligent failure to warn. He admitted that he assumed the risk of riding a motorcycle, and he agreed to indemnify the Seller and hold it harmless. Shortly after buying the bike, Harrell was riding down the road when (taking his allegations as true), the front end began to wobble, thrash, and violently turn, causing him to crash into a car. He sustained serious injuries and sued. Harrell brought claims against the Seller for its own negligence in assembling, setting up, servicing, repairing, and/or inspecting the motorcycle. He also sued the Seller in its capacity as a seller in the stream of commerce for strict products liability and negligent products liability arising out of manufacturing defects, design defects, and the failure to warn of those defects. Specifically, the complaint included three strict products liability counts (counts II, III, and IV) and three negligent products liability counts (counts V, VI, and VII). He did not sue Suzuki, the manufacturer. The Seller moved to dismiss, arguing that the exculpatory clause in the motorcycle sales contract was dispositive and barred the suit. The trial court agreed and dismissed with prejudice. On appeal, Harrell advanced three arguments. First, he argued that the exculpatory clause was ambiguous and therefore unenforceable because it did not identify what he was releasing. Second, he argued that the issue of whether consideration was paid was outside the four corners of the Complaint, so it should not have been considered. Third, Harrell argued that even if the exculpatory clause was valid, its plain language did not apply to strict products liability claims or, if it does, the court should find it not enforceable based on public policy. The DCA rejected the first two arguments without any comment, but the DCA gave the plaintiff a huge win in holding that the exculpatory clause did not apply to strict products-liability claims. The language of the exculpatory clause applied to claims of negligence. Exculpatory clauses are disfavored because they relieve parties from the duty to use care, but courts do enforce them in light of the respect for contracts if they are unambiguous and do not contravene public policy. Though there were general words about releasing “any liability or responsibility in any way for personal injury or death,” the same sentence narrowed the scope of the release by specifically talking about claims of negligence or gross negligence. Accordingly, the exculpatory clause in this case undoubtedly applies to the ordinary negligence count (count I) and the negligent products liability counts (counts V, VI, and VII). The clause, however, does not apply to the three strict products liability counts because those counts arguably do not fall within the umbrella of a negligence claim. While a strict liability claim is “to some extent a hybrid of traditional strict liability and negligence doctrine,” it is nonetheless a claim separate and apart from a negligence claim. The DCA then went a step further and stated that even if the language HAD barred the claim under its plain terms, they’d refuse to enforce it because it violates public policy. A contract is void as against public policy if “it is injurious to the interests of the public or contravenes some established interest of society.” “The public policy of a state or nation should be determined by its Constitution, laws, and judicial decisions.” The DCA traced the origin of Florida’s cause of action for strict products liability to West v. Caterpillar Tractor Co., 336 So. 2d 80, 87 (Fla. 1976), and concluded that the West decision and its progeny therefore reflect a clear public policy to protect consumers from injuries caused by unreasonably dangerous products placed on the market by manufacturers and retailers. Not just buyers are affected. Allowing these sorts of agreements places other motorists and bystanders at risk and absolves the seller of any responsibility or any incentive to reduce the danger to the public. The Court made a survey of out-of-state and federal decisions that agree with such a public policy. The DCA was untroubled by the fact that Harrell had not sued Suzuki, and it rejected the Seller’s argument that there was no public policy at play because the case did not involve the manufacturer. The underlying basis for the doctrine of strict liability is that all entities within a product’s distributive chain “who profit from the sale or distribution of [the product] to the public, rather than an innocent person injured by it, should bear the financial burden of even an undetectable product defect.” As the retailer Defendant is within the subject motorcycle’s distributive chain, it cannot insulate itself from strict liability in tort merely because Plaintiff has other potential remedies available. Reversed in part and remanded.

Mech v. Brazilian Waxing By Sisters, Inc.—(J. Forst; 4DCA; 11/2/22). On August 10, 2022, the DCA issued an opinion in this case. The holding 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 some 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). Well, the DCA granted rehearing and (drumroll) actually changed its mind. The change appears to be based on a mistake of fact. While the DCA maintains that not all of the Rules of Civil Procedure are applicable to Small Claims cases, Rule 7.020 of the Small Claims Rules provides that the court may order an action to proceed under one or more of the Rules of Civil Procedure. In an order cancelling a pretrial hearing, the court wrote that the Florida Rules of Civil Procedure “are invoked.” Thus, Rule 1.510 applied to the subsequent motion for summary judgment including the new requirement that courts explain the basis for its ruling on a motion for summary judgment applied to the small claims case. The summary judgment order was reversed and the case was remanded with instructions for the court to enter a new order that states the reasons for granting or denying the motion.

Off Lease Only LLC v. Chariscar—(J. Artau; 4DCA; 11/2/22). This is yet another case about trying to vacate a default judgment. The litigation involved claims that a car dealer violated the Florida Consumer Protection Practices Act and the Florida Deceptive and Unfair Trade Practices Act. The car dealer’s attorney arrived 25 minutes late to an in-person case management conference, so the court entered a default. The dealer filed a motion to vacate the judicial default two days after it was entered, asserting that the lawyer had been caught in traffic. The motion did not get set for hearing, and the trial court entered a default final judgment noting that the dealer had not moved forward on the motion to vacate. The dealer appealed. The DCA noted that it was well-settled law that a court cannot enter a default judgment while there is a pending motion to set the default aside. Reversed and remanded.

<https://www.floridasupremecourt.org/content/download/852195/opinion/213553_DC13_11022022_095321_i.pdf>