LEGAL ROUND UP

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Allstate Fire and Cas. Ins. Co. v. Hallandale Open MRI, LLC, a/a/o Alexia Blake, Case No. 3D16-38 (Fla. 3d DCA November 29, 2017)

More Than You Ever Thought You Wanted to Know About Second-Tier Cert

Headnotes:

- Jurisdiction for "second-tier" certiorari review of an appellate decision of the Circuit Court requires a violation of a "clearly established principle of law resulting in a miscarriage of justice."
- No jurisdiction where principle of law becomes clearly established **after** Circuit Court decision.

In *Hallendale Open MRI*, the Third District Court of Appeal revisited the standard for petitions for writ of certiorari and certified a question of great public importance to the Florida Supreme Court. The opinion was issued following a second motion for rehearing and arises out of somewhat nuanced lower court proceedings.

The case centered on a personal injury protection ("PIP") automobile insurance policy dispute between Allstate and a medical provider. Specifically, whether Allstate's policy contained sufficiently specific language to limit Allstate's reimbursements to the provider to 80% of the maximum charges of the Medicare Fee Schedule identified in the PIP statute. The county court determined the policy language failed to specify reimbursements would be limited to the (typically lower) Medicare Fee Schedule amount identified in the statute.

Allstate appealed to the Eleventh Judicial Circuit Court Appellate Division for Miami-Dade County. At the time of the appeal to the Appellate Division, there was no controlling authority on the issue from the Third District or the Florida Supreme Court. With no binding authority to direct the outcome, the panel acknowledged two conflicting decisions from the First District and the Fourth District, one determining the same language was sufficient to limit reimbursements, the other determining such language to be insufficient. The three-judge panel affirmed the county court's judgment the policy was insufficient.

Following the panel's decision, Allstate filed a petition in the Third District seeking second-tier certiorari. While the petition was pending, two notable events occurred. First, the Third District issued an opinion in a separate case, which held the same policy language at issue in the *Hallendale Open MRI* case was clear and sufficient to limit reimbursements to the statute. *See Fla. Wellness & Rehab. v. Allstate Fire & Cas. Ins. Co.*, 201 So. 3d 169 (Fla. 3d DCA 2016). And second, the Florida Supreme Court accepted jurisdiction over the two conflicting cases. *See Allstate Ins. Co. v. Orthopedic Specialists*, No. SC15-2298 (Fla. Jan. 20, 2016) (accepting jurisdiction).

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The Third District's opinion in *Hallendale Open MRI* followed months later, and despite having declared the language used in Allstate's policy clear (thus taking a different view of the language than the county and circuit court judges), the Third District dismissed Allstate's petition reasoning that there was no violation of a "clearly established principle of law resulting in a miscarriage of justice." When the Appellate Division of the Circuit Court issued its opinion, the applicable principle of law was sufficiently unsettled, given the Florida Supreme Court accepted jurisdiction to resolve conflicting decisions on the issue. *Allstate Fire & Cas. Ins. Co. v. Hallandale Open MRI, LLC*, 208 So. 3d 741, 742 (Fla. 3d DCA 2016). In other words, no clearly established principle existed **at that time**.

Allstate requested rehearing of the decision and while the motion was pending, the Florida Supreme Court issued its opinion on the conflict issue, settling the law in favor of Allstate and consonant with the Third District's new decision. The Third District felt compelled by the issuance of the Florida Supreme Court opinion and granted rehearing in April. The Third District, channeling Judge Logue's dissent in the original *Hallendale Open MRI* opinion, changed course and allowed Allstate to benefit from the Supreme Court's resolution of the underlying issue. *Allstate Fire & Cas. Ins. Co. v. Hallandale Open MRI, LLC*, No. 3D16-38, 2017 WL 1401447 (Fla. 3d DCA Apr. 19, 2017). Based upon that opinion, the medical provider requested its own rehearing, asking the Court to re-avow its earlier analysis. For those keeping count, that's the second rehearing in the same appeal.

And in November, the Third District did just that. *See Allstate Fire & Cas. Ins. Co. v. Hallandale Open MRI, LLC*, No. 3D16-38, 2017 WL 5760355 (Fla. 3d DCA Nov. 29, 2017). Reasoning, as it had originally, the Circuit Court Appellate Division committed no error when it failed to accurately predict which of the two persuasive, yet competing, precedents the Florida Supreme Court would ultimately adopt, the Third District withdrew its second opinion (issued after the first rehearing) and ruled in favor of the medical provider.

Recognizing the procedural oddities exemplified by this case, the Third District also certified a question to the Florida Supreme Court on the scope of its second-tier certiorari jurisdiction.

Obregon v. Rosana Corp. d/b/a Original Uncle Tom's Barbeque, No. 3D16-2104 (Fla. 3d DCA 2017)

Offer of Judgments & Barbeque: Savor the Good Ones

Headnotes:

- A **cross**-appeal cannot be taken from a judgment separate from the judgment(s) already on appeal. A separate appeal, with a new case number, must be taken.
- A proposal for settlement and general release must be clear and unambiguous to be enforceable, but appellate courts should refrain from "nit-picking" the language of offer of judgments

Two lessons can be gleaned from a recent Third District Court of Appeal opinion, *Obregon*. In *Obregon*, a patron of Uncle Tom's Barbeque joint

brought suit against the restaurant after allegedly slipping and falling on the premises. Following the filing of the complaint, the parties engaged in thorough discovery, which revealed the plaintiff had failed to disclose numerous health care providers that treated her for the injuries and pain for which she was seeking recourse for in the action. The plaintiff had made several misstatements in depositions and written interrogatories that came to light following discovery.

Accordingly, Uncle Tom's moved to strike the plaintiff's pleadings for fraud on the court and contemporaneously filed an offer of judgment. Following an evidentiary hearing, the trial court struck the complaint and thereafter dismissed the action. But, the trial court found the language of the offer of judgment was unclear because the accompanying release included Obregon's "legal representatives" in the definition of the releasing parties and so the offer could not serve the basis for attorney's fees. The plaintiff appealed the dismissal of her action, while Uncle Tom's cross-appealed the order denying entitlement to attorney's fees.

On appeal, the Third District affirmed the trial court's order striking the complaint and dismissing the action finding there was "clear and convincing" evidence the plaintiff committed fraud on the court through her mendacious answers in discovery. But, the Third District concluded Uncle Tom's improperly filed the appeal from the order denying entitlement to attorney's fees as a *cross-appeal* because it is not the function of a cross-appeal to seek review of a distinct and separate judgment. Instead of dismissing the appeal, however, the Third District showed leniency and held Obregon had "plainly been advised of the order being appealed, and … suffered no prejudice or inconvenience" by the incorrect designation of the appeal.

And Uncle Tom's was quite fortunate the Third District overlooked its mistake because the Court went on to find the language contained in the proposal for settlement and general release was "clear, unambiguous, and enforceable," contrary to the trial court's finding. The Third District acknowledged the language was a bit atypical, but still clear enough to be compliant with section 768.79 of the Florida Statutes.

In that ruling, the Third District followed a recent pattern of appellate court decisions that refrained from "nit-picking" the language of offer of judgments. *Carey-All Transport, Inc. v. Newby*, 989 So. 2d 1201, 1206 (Fla 2d DCA 2008) ("parties should not 'nit-pick' the validity of a proposal for settlement based on allegations of ambiguity unless the asserted ambiguity could 'reasonably affect the offeree's decision' on whether to accept the proposal for settlement"), *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1079 (Fla. 2006) ("given the nature of language, it may be impossible to eliminate all ambiguity"), *Kiefer v. Sunset Beach Invs. LLC*, 207 So. 3d 1008 (Fla. 4th DCA 2017).

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Law Offices of Herssein and Herssein, P.A. v. United Services Auto. Ass'n, No. 3D17-1421 (Fla. 3d DCA 2017)

Facebook: The Friends You Never Had

Headnotes:

- "A Facebook friendship does not necessarily signify the existence of a close relationship" for purposes of disqualifying a judge.
- But, the Third and Fourth Districts are in conflict on the issue, which is pending in the Florida Supreme Court.

The Law Offices of Herssein and Herssein, P.A., brought a suit against its former client, United Services Automobile Association, for breach of contract and fraud. But in the course of litigation, one of USAA's executives, who had the potential to become a party to the dispute himself, may have tampered with a witness or two. In response to the tampering claims, USAA hired a former Circuit Court judge to represent the executive. An issue arose when the Herssein firm discovered the executive's new counsel was Facebook friends with … the judge presiding over its case!

Of course, the Herssein firm moved to disqualify the judge, alleging the firm had a well-grounded fear of not receiving a fair and impartial trial. The trial court denied the motion and the Herssein firm moved for a writ of mandamus to compel the disqualification. And so, the Third District was tasked with answering the question of whether a "reasonably prudent person" would fear s/he would be treated impartially because of a judge's Facebook friendship.

The Third District began the analysis by noting mere allegations of friendship between a judge and an attorney have been deemed insufficient to disqualify a judge. But in this day of technology, could a virtual friendship amount to more than––as the kids would say––an IRL* friendship? (*For the non-kids in the audience, that's "In Real Life.")

Indeed, in one recent opinion, the Fourth District held recusal was required when a judge was a Facebook "friend" with the prosecutor in a case. *See Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012). The Fourth District relied upon a 2009 Judicial Ethics Advisory Committee Opinion which focused its analysis on the judge's "active role in accepting or rejecting potential friends" as it may convey the impression that the lawyer is in a special position to influence the judge.

The Third District took a different view of these online friendships. Siding with a recent decision from the Fifth District Court of Appeal, *see Chace v. Loisel*, 170 So. 3d 802 (Fla. 5th DCA 2014), the Third District held "[a] Facebook friendship does not necessarily signify the existence of a close relationship." The Court rationalized some individuals have "thousands" of Facebook friends and often can't even remember the names of all the friends they've added. And perhaps more importantly, the Court noted many Facebook friends are selected based upon Facebook's data-mining technology rather than personal interactions. And so, it could very well be a Facebook friend is more of a reflection of a personal and professional network, than it is a representation of a person's circle of trust.

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Law Offices of Herssein and Herssein, P.A. v. United Services Auto. Ass'n

In sum, the Third District concluded "[a]n assumption that all Facebook 'friends' rise to the level of a close relationship that warrants disqualification simply does not reflect the current nature of this type of electronic social networking." And so the Third District denied the petition. It did, however, certify conflict with the *Domville* opinion, and (as of the time of writing) jurisdictional briefs are pending in the Florida Supreme Court. Perhaps the Supreme Court will finally give us an answer to one of the great questions of our age: How close *are* your Facebook friends, really?

But stay tuned for the Florida Supreme Court's "like," or not. On December 11, 2017, the Florida Supreme Court accepted jurisdiction for discretionary review upon assertion of twin bases: (i) the opinion expressly and directly conflicts with *Domville*; and (ii) the opinion expressly and directly affects a class of constitutional officers. L*aw Offices of Herssein and Herssein, P.A. v. United Services Auto. Ass'n*, No. SC17-1848.

Joyce v. Federated National Insurance Co., No. SC16-103 (Fla. 2017)

The Florida Supreme Court Does Away with Rare and Extraordinary Circumstances Requirement for Contingency Fee Multipliers

Headnotes:

- Contingency fee multipliers are **not** just for "rare" or "extraordinary circumstances."
- In deciding whether to apply a multiplier, court should place itself in the attorney's position, as of the time the attorney decided to take the case.

In a recent opinion, the Florida Supreme Court distanced itself from prior precedent regarding contingency fee multipliers. The Court wrote to clarify a misapprehension of its seminal 1990 opinion *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1999), in which the Court held while trial judges "are not required to use a multiplier," when they do, "exacting justification" must be "presented to justify the utilization of a multiplier." *Id.* at 834. Courts interpreting *Quanstrom*, including the Fifth District Court of Appeal, understood *Quanstrom* to hold the multiplier itself was to be used only in "rare" and "extraordinary circumstances." According to the Florida Supreme Court, that was incorrect.

In *Joyce*, the Court pronounced that after reviewing its own precedent regarding contingency fee multipliers, "it is clear that th[e] Court ha[d] never limited the use of contingency fee multipliers to only 'rare' and 'exceptional' circumstances." The Court reasoned contingency fee multipliers provide trial courts with the flexibility to ensure lawyers who take difficult cases on a contingency fee basis are adequately compensated. And without the ability for the trial court to employ multipliers, clients with difficult and complicated cases would likely be unable to find counsel.

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The Court further commented that when determining whether an amount of attorney's fees is reasonable, the award for the work done, under the lodestar analysis, is properly analyzed through hindsight by determining the outcome of the case and the amount of time that went into procuring that outcome. But in regards to the contingence fee multiplier, the analysis is best undertaken using the same lens as the attorney at the time the attorney made the decision to take the case.

Ultimately, the Florida Supreme Court reaffirmed that trial courts should apply the *Rowe* factors and determine if they are being presented with competent, substantial evidence regarding those factors. If so, a contingency fee multiplier may indeed be appropriate.

Appellate Practice Pointers: Perennial Traps for the Unwary (You Really Should Consult an Appellate Specialist)

Emerald Coast Utilities Authority v. Bear Marcus Pointe, LLC, Case No. 1D15-5714 (Fla. 1st DCA 2017)

Do check your spam folders every once in a while!

An order in the trial court was rendered assessing attorneys' fees against Emerald Coast in an eminent domain proceeding. The order was sent by email to the email addresses provided by each party's counsel in the action. But, counsel for Emerald Coast employed the strictest of email filters and the order was swept up -- and then deleted -- by counsel's email server. As Murphy's Law dictates, whatever can go wrong in these situations will go wrong. By the time counsel realized the order was entered, the time for appeal had lapsed.

Emerald Coast found itself in the trial court on a Rule 1.540(b) motion to vacate arguing its counsel's failure to see the order due to the spam filter was excusable neglect. Based on that excusable neglect, Emerald Coast requested the court re-enter the order so as to restart the jurisdictional clock. (Bonus pointer: ***Don't*** do that.) But, an evidentiary hearing ensued in which the clerk's IT director, the firm's IT personnel, several other IT specialists, and shareholders of the firm all testified and it was revealed there the firm had made a conscious decision to employ draconian spam filters that immediately deleted any item classified as spam.

Having determined the neglect was not so excusable, the trial court denied the 1.540(b) motion. An appeal to the First District Court of Appeal followed, and following a thorough breakdown of all the testimony that was elicited, the First District affirmed the trial court's denial of vacatur, determining the trial court's careful consideration of this testimony could not amount to an abuse of discretion.

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American Federated Title Corp. v. Gross, Case No. 3D14–758 (Fla. 3rd DCA 2017)

Do stay apprised of any possible conflicts of law affecting your appeal -- even after your appeal is over.

Following a crushing defeat at the hands of the Third District Court of Appeal, which affirmed the dismissal of American Federated's claim for malicious prosecution, appellant American Federated Title Corporation received the mandate from the appeal and thought all was lost. Fortuitously, less than two months later, the Fourth District Court of Appeal issued an opinion directly conflicting with the law relied on in the Third District's opinion, and certified conflict between the two cases.

Sensing hope on the horizon, American Federated moved the Third District to recall its mandate, pursuant to section 43.44 of the Florida Statutes and Florida Rule of Appellate Procedure 9.340(a). Under Rule 9.340(a), an appellate court may recall its mandate within 120 days after is issuance. The Third District granted American Federated's motion and recalled the mandate pending the Florida Supreme Court's jurisdictional determination.

Eventually, the Florida Supreme Court accepted jurisdiction and issued its opinion on the merits of the claim siding with the Fourth District's rationale. The Third District withdrew its original opinion and reissued a new one consistent with the Florida Supreme Court's precedent and reinstated American Federated's claim. ¶

Walgreen Co. and Holiday CVS, LLC v. Rubin, No. 3D17-282 (Fla. 3d DCA 2017)

Do remember that "undue burden" or "undue expense" are never reasons for establishing irreparable harm for certiorari jurisdiction.

In a wrongful death suit, the defendants, Walgreens and CVS, were tasked with onerous requests for production, the costs for which were estimated to be over $21,000. Accordingly, they attempted to shift the costs of discovery onto the plaintiffs but were ultimately thwarted by the trial court. Seeking interlocutory review of the order, both defendants petitioned the Third District for a writ of certiorari, claiming the discovery order constituted irreparable harm.

To establish the requirements for a writ of certiorari, the defendants were required to prove (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on post-judgment appeal. The last two elements are commonly referred to as "irreparable harm," are jurisdictional in nature, and were placed at the forefront of the Third District's analysis in this case.

But of course, the caselaw in Florida is legion that "[m]ost economic concerns regarding the cost of litigation do not involve the essential requirements of the law or a violation of a clearly established principle of law resulting in a miscarriage of justice." The usual remedy available to a party that has incurred burdensome discovery costs is to "recoup them through taxation of costs, not via certiorari." The Third District accordingly denied the petition, holding that in "Florida jurisprudence undue burden or expense normally are insufficient to establish the irreparable harm needed for certiorari jurisdiction."

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