

CIVIL CASE LAW UPDATE

HOT TOPICS IN APPELLATE PRACTICE 2011
March 4, 2011 -- Jacksonville, Florida

BY MATTHEW J. CONIGLIARO
Carlton Fields, P.A.
St. Petersburg, Florida
mconigliaro@carltonfields.com

PART I

A LOOK AT THE FLORIDA SUPREME COURT'S TEN MOST IMPACTFUL DECISIONS OF 2010

1. *Curd v. Mosaic Fertilizer, LLC*,
39 So. 3d 1216 (Fla. 2010)

The court held that commercial fisherman could bring a common law negligence claim against a defendant that allegedly polluted Tampa Bay's public waters. The court determined that the defendant's business activities and the plaintiffs' special interests gave rise to a duty to protect the plaintiffs' economic interests.

2. *Florida Dep't of State v. Mangat*,
43 So. 3d 642 (Fla. 2010)

Following bypass certification by the First District, the supreme court held that the ballot summary for a legislatively proposed constitutional amendment regarding Florida health care services was misleading and invalid. The court also held it lacked authority to fix the misleading summary by ordering the proposed amendment substituted for the summary. The court receded from an unpublished order in an earlier case in which the court ordered that remedy.

3. *In re Amendments to Fl. R. Jud. Admin. 2.420 and the Fl. R. App. P.*,
31 So. 3d 756 (Fla. 2010)

The court adopted new rules covering public access to judicial branch records. The new rules make clear that parties may no longer seal sensitive matters from the public's view merely because the parties consider the documents sensitive. Public records may be sealed only if they meet specific qualifications.

4. *Bosem v. Musa Holdings, Inc.*,
46 So. 3d 42 (Fla. 2010)

The court held that, with the exception of personal injury matters, in all tort and contract cases where the loss is wholly pecuniary and may be fixed as of a definite time, prejudgment interest should be allowed as a matter of right. The court explained that whether the loss is liquidated or unliquidated is not relevant.

5. *Companioni v. City of Tampa*,
Case No. SC09-1800 (Fla. Dec.16, 2010)

The court held that, to preserve an attorney misconduct objection sustained during trial for purposes of a motion for new trial or appellate review, a motion for mistrial must be made when the objection is sustained. The court explained that, otherwise, the conduct is subject to a fundamental error analysis.

6. *Attorney's Title Ins. Fund v. Gorka*,
36 So. 3d 646 (Fla. 2010)

The court held that a joint proposal for settlement conditioned on the mutual acceptance of all offerees is invalid and unenforceable. The court explained that such joint offers preclude any offeree from independently evaluating or settling the offeree's own claim by accepting the proposal.

7. *Custer Med. Ctr. v. United Auto. Ins. Co.*,
35 Fla. L. Weekly S640 (Fla. Nov. 4, 2010)

The court held that, to grant relief on second-tier review of a decision by a circuit court acting in its appellate capacity, a district court must analyze and develop how the circuit court denied the petitioner procedural due process or departed from the essential requirements of law. The supreme court explained that the district court may not simply disagree with the circuit court's determination and interpretation of applicable law.

8. *Westgate Miami Beach, Ltd. v. Newport Operating Corp.*,
Case No. SC09-1881 (Fla. Dec. 16, 2010)

The court held that a trial court may reserve jurisdiction in a final judgment to award prejudgment interest. In reaching this decision, the court receded from a prior decision reaching the opposite conclusion. Prejudgment interest will now be addressed in a manner somewhat similar to how trial courts address attorney's fees and costs.

9. *Aills v. Boemi*,
29 So. 3d 1105 (Fla. 2010)

The court quashed a district court decision that reversed a trial court judgment based on improper closing arguments. The court held that an objection made during closing arguments did not sufficiently raise the concern on which the district court reversed. The court emphasized that, except with respect to fundamental error, an appellate court cannot consider any ground for objection not presented to the trial court.

10. *Butler v. Yusem*,
44 So. 3d 102 (Fla. 2010)

The court stated that justifiable reliance is an essential element of a negligent misrepresentation claim but not an essential element of a fraudulent misrepresentation claim. The court acknowledged that fraud requires reliance and that the recipient of a fraudulent misrepresentation may not rely on a representation actually known to be false or obviously false.

PART II

SELECTED ADDITIONAL SIGNIFICANT RECENT DECISIONS

United States Supreme Court

1. *Ortiz v. Jordan*,
131 S. Ct. 884 (2011)

The United States Supreme Court considered whether an order denying a summary judgment motion may be appealed after a full trial on the merits. The Court's answer was no. The court did not answer whether an exception might be made for a summary judgment motion concerning only "the substance and clarity of pre-existing law" might be reviewable. Because the party that lost at trial did not file a rule 50(b) motion arguing that the opponent failed to prove its case, and the summary judgment order was not reviewable, there was nothing for the appellate courts to review on appeal.

Eleventh Circuit Court of Appeals

2. *Doe v. Florida Bar*,
630 F.3d 1336 (11th Cir. 2011)

Unsuccessful applicant for board certification filed suit against The Florida Bar claiming a due process violation in the confidential peer review process. Court held that she had no constitutionally protected liberty or property interest in board certification and so no due process violation existed. The court suggested that the answer might be different with respect to property interests if board certification were required to practice law.

Florida Supreme Court

3. *In re Amendments to Fla. R. App. P.*,
41 So. 3d 161 (Fla. 2010)

Court amended appellate rules regarding appellate mediation for all appellate courts. Any case may be referred to mediation, with exceptions including: criminal, post-conviction, extraordinary writs, contempt, and *Jimmy Ryce* proceedings.

4. *In re Amendments to Fla. R. App. P.*,
41 So. 3d 885 (Fla. 2010)

Court amended rule 9.410 to include new subsection addressing appellate fees as sanction under section 57.105. Adopts the statute's safe harbor, requires motion to be filed by later of reply brief's due date or 30 days from motion's service. Requires motion to be served twice — once for initial notice and again if motion is filed.

5. *Petion v. State*,
2010 WL 4117037 (Fla. Oct. 21, 2010)

When evidence is improperly admitted over objection in a bench trial, trial court must make an express statement on the record that the erroneously admitted evidence did not contribute to the final determination. Otherwise, the appellate court cannot presume the trial court disregarded evidence specifically admitted as proper. Appellate court still must conduct a harmless error analysis.

6. *Strax Rejuvenation and Aesthetics Institute, Inc. v. Shield*, 2010 WL 3782044 (Fla. Sept. 30, 2010)

Court quashed a district court decision holding that circuit court's time stamp on notice of appeal was presumed correct and could not be overcome by affidavit. Court held that presumption could be overcome by evidence the notice was timely filed.

First District Court of Appeal

7. *Roadrunner Const., Inc. v. Dep't of Fin. Servs., Div. of Workers' Comp.*, 33 So. 3d 78 (Fla. 1st DCA 2010)

A divided court held that the term "clerk" in rule 9.420(f)(15) is not ambiguous and refers to the clerk of the office where a notice of appeal is to be filed. If that clerk's office is open on the 30th day after rendition of an appealable order, the notice must be filed that day, even if the appellate court clerk's office is closed on that date.

8. *Martin County Conservation Alliance v. Martin County*, 2010 WL 5072588 (Fla. 1st DCA Dec. 14, 2010)

Divided court sanctioned appellants and counsel for filing a frivolous administrative appeal. Court emphasized that standing at the administrative level is distinct from standing on appeal — the latter requires the appellant be adversely affected by the appealed order. Majority characterized appeal as reargument of facts without challenging sufficiency of evidence. Dissent characterized appeal as raising legal challenges to agency's decisions.

9. *Students for Online Voting v. Machen*, 24 So. 3d 1273 (Fla. 1st DCA 2009)

Court issued writ of mandamus directing agency to file its own order, thereby rendering it and permitting an appeal to proceed.

10. *Baldwin v. State*,
20 So. 3d 991 (Fla. 1st DCA 2009)

Criminal defendant argued trial court lacked jurisdiction to proceed to trial because the state had taken a non-final appeal from an earlier order in the case. District court rejected that argument, explaining that the state's appeal had been treated as a certiorari petition and that, absent a stay or order, original proceedings in a higher court do not divest the lower court of jurisdiction, including jurisdiction to enter final judgment.

Second District Court of Appeal

11. *Anderson v. Vander Meiden ex rel. Duggan*,
36 Fla. L. Weekly D223 (Fla. 2d DCA Jan. 28, 2011)

A trial court denied a motion to compel their discovery, and the Second District, finding irreparable harm, quashed the order. The district court determined that the discovery denial eviscerated the petitioner's setoff defense and that proving harmful error post-trial would have been nearly impossible.

12. *Cotton States Mut. Ins. Co. v. AFO Imaging, Inc.*,
46 So. 3d 140 (Fla. 2d DCA 2010)

Petitioner failed to demonstrate irreparable harm required for certiorari petition by merely arguing that materials ordered to be disclosed were irrelevant or nonexistent.

13. *Workmen's Auto Ins. Co. v. Franz*,
24 So. 3d (Fla. 2d DCA 2009)

Rule 9.110(m) permits appeals from judgments that determine the existence of insurance coverage "in cases in which a claim has been made against an insured and coverage thereof is disputed by the insurer." Court held this rule applies where coverage issues are resolved in third-party coverage cases but does not apply to first-party claims for PIP, UM, or medical benefits. Court dismissed appeal regarding uninsured motorist coverage claim.

14. *G.W. v. Rushing*,
22 So. 3d 819 (Fla. 2d DCA 2009)

District court explained that lower tribunals do not have authority to strike notices of appeal, which are considered property of the higher tribunal. Clerk has ministerial duty to forward notice even if ordered stricken.

15. *City of Marco Island v. Dumas*,
13 So. 3d 108 (Fla. 2d DCA 2009)

District court held that petition for writ of mandamus is the proper vehicle to challenge a circuit court's erroneous dismissal of an appeal as untimely.

Third District Court of Appeal

16. *Quest Diagnostics, Inc. v. Rapio*,
36 Fla. L. Weekly D151 (Fla. 3d DCA Jan. 19, 2011)

District court granted certiorari petition quashing order requiring lab to produce last known names and addresses of patient's medical providers and allowing respondent's attorney and photographer to enter the premises. Court held that such discovery would lead to discovery of patient's name (which was protected from discovery in the case) and would invade the privacy of non-parties.

17. *AmeriLoss Public Adjusting Corp. v. Lightbourn*,
46 So. 3d 107 (Fla. 3d DCA 2010)

Appellant that was not a party to the proceedings below and did not seek to intervene lacked standing to appeal order asserted to adversely affect appellant.

18. *American Ed. Enters., LLC v. Board of Trustees of the Internal Improvement Trust Fund*, 45 So. 3d 941 (Fla. 3d DCA 2010)

The court granted a certiorari petition, quashing an order requiring disclosure of financial documents in a commercial case. The court determined that the requests were overbroad with respect to their time frame and their lack of relevance to the issues in the case.

19. *Alvarado v. Bayshore Grove Mgmt., LLC*,
35 Fla. L. Weekly D2217 (Fla. 3d DCA Oct. 6, 2010)

Judge Schwartz continues his quest to rename the tipsy coachman doctrine as the drunken cabbie doctrine.

20. *AA Acquisitions, LLC v. Opa-Locka Flightline, LLC*,
23 So. 2d 777 (Fla. 3d DCA 2009)

District court held that review of stay order entered by circuit court sitting in its appellate capacity is by certiorari.

21. *Knight v. State*,
2009 WL 4281370 (Fla. 3d DCA Dec. 2, 2009)

District court held that an order denying a rule 3.800(c) motion to mitigate sentence is not appealable.

Fourth District Court of Appeal

22. *United Automobile Ins. Co. v. Palm Chiropractic Ctr., Inc.*,
51 So. 3d 506 (Fla. 4th DCA 2010)

Insurer attempted to make final payment to health care provider by check stating it was tendered in full and final payment for all benefits due. Health care provider deposited the check and then sued for additional payments. County court rejected insurer's accord and satisfaction defense and entered judgment for provider. Circuit court affirmed. On second-tier review, the district court explained that both courts reached the wrong result but held that mere legal error was not sufficient grounds for certiorari—the lower court must have failed to afford due process or applied the wrong law.

23. *Mitsubishi Motors Corp. v. Laliberte*,
35 Fla. L. Weekly D1327 (Fla. 4th DCA June 16, 2010), *withdrawn on rehearing*, 35 Fla. L. Weekly D2849 (Fla. 4th DCA Dec. 15, 2010)

Divided district court originally reversed large jury verdict on grounds the trial court improperly excluded certain evidence. On rehearing, the court unanimously decided that no error occurred and affirmed the judgment.

24. *Saris v. State Farm Mut. Auto. Ins. Co.*,
49 So. 3d 815 (Fla. 4th DCA 2010)

Insurance policy provision violated Florida public policy, and was not enforceable, because it required the insured to sue an uninsured motorist who injures the insured as a condition precedent to recovering uninsured motorist benefits. The insured did not raise the public policy argument below, but the district court held that the policy's flaw was fundamental.

25. *USAA Cas. Ins. Co. v. Allen*,
17 So. 3d 1270 (Fla. 4th DCA 2009)

District court held, under *Melbourne*, failure to renew objection to use of peremptory challenge before jury is sworn fails to preserve challenge for appeal.

26. *Tarik, Inc. v. NNN Acquisitions, Inc.*
17 So. 3d 912 (Fla. 4th DCA 2009)

Party appealed from summary judgment order that did not end litigation but did rule that one party had no legal right to possess certain real property. District court held that the order was not appealable under rule 9.130(a)(3)(C)(ii) because the order did not grant the right to possess the property.

27. *United Auto. Ins. Co. v. Buchalter*,
14 So. 3d 1100 (Fla. 4th DCA 2009)

District court reviewed circuit court's dismissal of appeal as untimely by second-tier certiorari.

Fifth District Court of Appeal

28. *Marion v. Orlando Pain and Med. Rehabilitation*,
36 Fla. L. Weekly D109 (Fla. 5th DCA Jan. 12, 2011)

Court sanctioned appellate counsel based on the tone and contents of a motion for rehearing directed at a per curiam affirmance without an opinion. The motion's first paragraph simply stated, "Oh." The remainder requested rehearing and certification without explaining what the court overlooked and included scandalous, legally irrelevant assertions without record support.

29. *Highwoods DLF EOLA, LLC v. Condo Developer, LLC*,
2010 WL 5184645 (Fla. 5th DCA Dec. 23, 2010)

Where party to local zoning proceeding appeals to circuit court by petition for certiorari, all parties below are entitled to be parties to the appeal. Court certified conflict with Second District decision to the contrary.

30. *DNA Ctr. for Neurology and Rehab. v. Progressive Am. Ins. Co.*,
13 So. 3d 74 (Fla. 5th DCA 2009)

Plaintiff filed amended complaint in circuit court seeking damages under \$5,000. After entry of adverse final judgment, plaintiff appealed. The district court *sua sponte* reversed the judgment on jurisdictional grounds, holding the circuit court lacked jurisdiction to hear the case and thus the district court lacked jurisdiction to hear the appeal.