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CASE LAW UPDATE

Dear Ladies and Gentlemen:

This month we would like to share with you some recent opinions from the Florida District Courts of Appeal regarding tort issues. Below, we are highlighting specific cases that may be of interest to you.

In *Sunbelt Environ., Inc. v. Gulf Coast Truck & Equip. Co.*, the First District Court of Appeal held that because proximate cause is not appropriately resolved at the summary judgment phase, the determination of whether the width of a truck exceeded federal or state standards is not appropriate until proximate cause of injury has first been found by the trier of fact.

In *Byers v. FIA Card Servcs.*, the Fourth District Court of Appeal held that the trial court erred in determining that the defendant waived his right to challenge the sufficiency of service of process by filing a motion for extension of time to respond to the complaint.

In *Kitroser v. Hurt*, the Florida Supreme Court held that, where an individual, non-resident defendant commits negligent acts in Florida, whether on behalf of a corporate employer or not, the corporate shield doctrine does not operate as a bar to personal jurisdiction in Florida over the individual defendant.

In *Rodgers v. After School Programs, Inc.*, the Fourth District Court of Appeal held that the plaintiffs were not entitled to interview jurors after trial to demonstrate that the jurors' nondisclosure of information regarding their previous involvement with the court system justified a new trial, where the jurors' failure to disclose the information was attributable to the plaintiffs' lack of diligence in uncovering the information during voir dire.

I. *Sunbelt Environ., Inc. v. Gulf Coast Truck & Equip. Co.*, Case No. 1D10-6079, 2012 Fla. App. LEXIS 4278 (Fla. 1st DCA March 19, 2012)

Proximate cause is not appropriately resolved at the summary judgment phase, and whether the width of a vehicle exceeds federal and state standards is not determinative until proximate cause of injury is first found by the trier of fact.

FACTS AND PROCEDURAL HISTORY

Clifford Smith ("Smith") was riding a bicycle alongside the white boundary line on State Road 181, in Escambia County, when a garbage truck came from behind and struck him, causing

him severe injuries, including amputation of an arm. Smith and his wife brought suit against the owner of the garbage truck, Sunbelt Environmental, Inc. ("Sunbelt"), which was settled before trial. Sunbelt then filed a third-party complaint against Gulf Coast Truck & Equipment Company, Inc. ("Gulf Coast"), the manufacturer of the truck, and Wastequip Manufacturing Company, LLC ("Wastequip"), the installer of the tarping device that was placed on the truck to prevent debris from disbursing from the truck bed. The gravamen of Sunbelt's complaint was that the arm installed on the truck, which extended and retracted the tarp unit, rendered the truck wider than both federal and state law permits, causing the arm to latch onto Smith's clothing, and thereby causing the accident.

Gulf Coast and Wastequip jointly moved for summary judgment, alleging, among other things, that Sunbelt's driver violated FLA. STAT. §§ 316.083 and 316.185, by failing to pass at a safe distance of "not less than three (3) feet" and in failing to decrease his speed as necessary in order to avoid colliding with Smith. They alleged that these negligent acts constituted an "unforeseeable, efficient and intervening cause that was independent of, and not set in motion by, any alleged negligence" of Gulf Coast or Wastequip. Sunbelt also moved for partial summary judgment and argued that the tarping system, as installed, increased the overall width of the truck beyond the state and federal legal limits.

The trial court determined that, because FLA. STAT. § 316.500 requires that the driver and the owner of a vehicle ensure that a vehicle comports with the law, neither Gulf Coast nor Wastequip could be held liable for any illegality as to the width of the truck. Instead, the duty was on Sunbelt, the owner, to ensure the legality of the truck. Therefore, the trial court granted Gulf Coast and Wastequip's motion for summary judgment, holding that there was no material issue of fact as to liability, since Sunbelt, alone, is responsible for the width of the tarping device.

APPELLATE DECISION

The First District Court of Appeal disagreed, finding that multiple issues of material fact still existed. First, the Court began its analysis by reiterating the general rule that proximate cause is not appropriately resolved at the summary judgment phase. According to the Court, the liability of Gulf Coast and Wastequip depends on whether the length of the tarp was the proximate cause of Smith's injury, as well as the driving of the truck's operator, the particular conditions of the road on that day, Smith's clothing, and the time of day of the accident. Further, the Court concluded, whether the truck exceeded federal or state standards regarding its width is not determinative until the proximate cause of injury is determined by the trier of fact.

Next, the Court analyzed FLA. STAT. § 316.515, which states that the "total outside width of any vehicle or the load thereon may not exceed 102 inches, *exclusive of safety devices determined by the department [of Transportation] to be necessary* for the safe and efficient operation of motor vehicles." (emphasis added). However, the Court held that whether the tarping device on the truck is a "safety device" for purposes of the statute was an issue of material fact that must be resolved before it could conclude that the truck was illegally wide at the time of the accident.

Finally, the Court analyzed FLA. STAT. § 316.500, under which the trial court held that Gulf Coast and Wastequip could not be liable because Sunbelt alone was responsible for the width of the truck. The Court disagreed, finding instead that the statute did not establish sole liability in tort upon an owner of a truck for injury caused by operation of the truck which exceeded legal width allowances. FLA. STAT. § 316.500 stated only that it is a violation of law for "any person to drive or move, or for the owner to cause or knowingly permit to be driven or moved, vehicle . . . exceeding the limitations." Nothing in this language suggested that liability is alone placed on the driver or owner of the vehicle. Based on these findings, the Court reversed and remanded.

II. *Byers v. FIA Card Servs.*, Case No. 4D11-2807, 2012 Fla. App. LEXIS 4118 (Fla. 4th DCA March 14, 2012)

Trial court erred in finding that the defendant waived his right to challenge the sufficiency of service of process by filing a motion for extension of time to respond to the complaint.

FACTS AND PROCEDURAL HISTORY

FIA Card Services ("FIA") filed a complaint against Stephen Byers ("Byers"). Byers filed a pro se motion for extension of time to respond to the complaint, which was agreed to by FIA and granted by the trial court. Within the time granted by the extension, Byers filed a motion to quash service, stating that it was by special appearance, and asserted reasons why he did not receive proper service of process. He then filed an amended motion to quash, adding an additional basis for granting the motion. The trial court denied the motion to quash, holding that Byers waived his right to challenge service by failing to file a limited appearance and by filing pleadings in the matter. The trial court did not address the merits of Byers' motions. Byers appealed, arguing that the trial court erred in finding that he waived his right to challenge the sufficiency of service of process by filing a motion for extension of time.

APPELLATE DECISION

At the outset, the Fourth District Court of Appeal cited the well-established rule that "[i]f a party takes some step in the proceedings which amounts to a submission to the court's jurisdiction, then it is deemed that the party has waived his right to challenge the court's jurisdiction regardless of the party's intent not to concede jurisdiction."[1] Further, "[a]ctive participation in the proceedings in the trial court, especially without objecting to jurisdiction due to the lack of service of process, constitutes a submission to the court's jurisdiction and a waiver of any objection."[2]

Ultimately, the Court relied on *Barrios v. Sunshine State Bank*,[3] in which the Third District addressed whether a motion for extension of time results in a waiver, agreeing with Byers. The Third District held that a motion for extension of time "is a mere technical piece of

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[1] *Solmo v. Friedman*, 909 So. 2d 560, 564 (Fla. 4th DCA 2005) (quoting *Cumberland Software, Inc. v. Great Am. Mortg. Corp.*, 507 So. 2d 794, 795 (Fla. 4th DCA 1987)).
[2] *Id.* (citing *Bush v. Schiavo*, 871 So. 2d 1012, 1014 (Fla. 2d DCA 2004)).
[3] 456 So. 2d 590 (Fla. 3d DCA 1984).

paper and does not constitute a general appearance . . . reflecting submission to a jurisdiction and waiver of defense, nor could a general appearance be presumed by such motion which did not go to the merits of the case."[4] Following *Barrios*, the Court held that because Byers' motion for extension of time did not go to the merits of the case, he did not submit himself to the jurisdiction of the court or waive his defense of lack of jurisdiction for failure of service of process. Therefore, the Court reversed and remanded to the trial court to address the merits of Byers' motion and amended motion to quash.

III. *Kitroser v. Hurt*, Case No. SC11-25, 2012 Fla. LEXIS 589 (Fla. March 22, 2012)

Where an individual, non-resident defendant commits negligent acts in Florida, whether on behalf of a corporate employer or not, the corporate shield doctrine does not operate as a bar to personal jurisdiction in Florida.

FACTS AND PROCEDURAL HISTORY

Rhina Castro Lara ("Castro Lara") was killed when an Airgas Carbonic, Inc. ("Airgas") employee, Dale Dickey ("Dickey"), negligently operated a commercial truck that struck her automobile on a highway in Palm Beach County, Florida. Mitchell Kitrosker ("Kitroser"), as personal representative of the estate of Castro Lara, sued Airgas, a foreign corporation, Dickey, and five additional Airgas employees (collectively, the "Airgas employees"), alleging that they were each personally responsible because, as a result of their supervision or training of Dickey, which occurred in Florida, they knew or should have known that Dickey was a careless and dangerous driver.

In his complaint, Kitroser alleged uncontested jurisdictional facts, asserting that the Airgas employees committed tortious acts while personally present at the Airgas business facility located in Florida. The Airgas employees each filed a motion to quash service of process and dismiss the complaint, asserting that because their actions were taken on behalf of Airgas, rather than for their own personal benefit, the corporate shield doctrine precluded personal jurisdiction over them in Florida, even though the negligent conduct occurred in Florida. Additionally, they argued that they do not reside in Florida, nor do they own, lease, or rent in Florida. However, none of the Airgas employees denied the allegations that each of the individual employees committed negligent acts while personally present in Florida.

The trial court determined that Florida's long-arm statute, FLA. STAT. § 48.193, provided a basis for personal jurisdiction over the Airgas employees in Florida. On appeal, the Fourth District Court of Appeal reversed and remanded with instructions that the trial court order denying the Airgas employees' motions to quash service of process and dismiss for lack of jurisdiction be vacated.[5] Additionally, the Fourth District certified the following question to the Florida Supreme Court:

> WHERE AN INDIVIDUAL, NON-RESIDENT DEFENDANT COMMITS NEGLIGENT ACTS IN FLORIDA ON BEHALF OF HIS CORPORATE

[4] *Id.* at 590-91.
[5] *Hurt v. Kitroser*, 50 So. 3d 62 (Fla. 4th DCA 2010).

EMPLOYER, DOES THE CORPORATE SHIELD DOCTRINE OPERATE AS A BAR TO PERSONAL JURISDICTION IN FLORIDA OVER THE INDIVIDUAL DEFENDANT?

APPELLATE DECISION

The Florida Supreme Court answered the certified question in the negative, and quashed the decision of the Fourth District. In doing so, the Court first analyzed the uncontested jurisdictional facts of the case under the two-step inquiry outlined in *Venetian Salami Co. v. Parthenais.*[6] The first step was to determine whether sufficient jurisdictional facts were alleged to bring the action within Florida's long-arm statute. In this case, the Airgas employees argued that Kitroser could not allege sufficient jurisdictional facts because the employees were not acting for personal benefit, or "personally," in Florida, but rather, only in pursuit of corporate interests. Therefore, they argued, the exercise of personal jurisdiction in Florida was precluded by the corporate shield doctrine.

The Court rejected this argument, explaining that the "corporate shield" doctrine provides that acts performed by a person exclusively in his corporate capacity not in Florida, but in a foreign state, may not form the predicate for the exercise of personal jurisdiction over the employee in the forum state. Here, the Airgas employees did not contest that they were in Florida, nor do they contest that they engaged in some form of conduct, training or supervision of Dickey in Florida. Further, the Court explained that Florida's long-arm statute does not except from personal jurisdiction those who are present in Florida and commit tortious acts in Florida, simply because they work on behalf of a corporate. Instead, Florida precedent holds that a non-resident, employee defendant who works out of Florida, commits no acts inside Florida, and has no personal connection with Florida, will not be subject to personal jurisdiction in Florida simply because he or she is a corporate officer or employee. Therefore, the Court held, the corporate shield doctrine was inapplicable to this case and did not exclude the Airgas employees from the exercise of personal jurisdiction by Florida courts.

Based on this finding, the Court declined to address the second inquiry of *Venetian Salami*, which is whether the defendant has sufficient "minimum" contacts with the state to satisfy the Fourteenth Amendment's due process requirements.

IV. *Rodgers v. After School Programs, Inc.*, 78 So. 3d 42 (Fla. 4th DCA 2012)

Plaintiffs are not entitled to interview jurors after trial to demonstrate that their nondisclosure of information justifies a new trial, where the jurors' failure to disclose the information is attributable to the plaintiffs' lack of diligence in uncovering the information during voir dire.

FACTS AND PROCEDURAL HISTORY

During the voir dire phase in a wrongful death action, Plaintiffs' counsel issued questionnaires to potential jurors, asking about their prior experience in court proceedings. This

[6] 554 So. 2d 499, 502 (Fla. 1989).

question elicited responses from four jurors who were ultimately empaneled on the jury. Juror No. 4 revealed that she had previously been an alternate juror in one case and a witness in a criminal case, but otherwise, had no in-court experience. Juror No. 9 stated that she had been to court only on a traffic matter. When Plaintiffs' attorney followed up, asking her if she was in court for a civil matter, to which she replied that she had only been in court for a traffic issue. Jurors No. 8 and 16 stated that they had never been in court before. The only follow-up question posted by Plaintiffs' counsel was if anyone had ever been sued in a civil case for breach of contract or promissory note, to which all four jurors said no.

After a verdict for the defense, the Plaintiffs moved for leave to interview Jurors 4, 9, 8 and 16, on the ground that they had concealed prior involvement with the court system during voir dire. As grounds for the motion, counsel alleged that Juror No. 4 was a woman with a common name who had been involved in 5 previous civil cases, and at the time of trial, was involved in two mortgage foreclosures. Juror No. 8 failed to reveal that she was a plaintiff in a civil case, a trustee in a probate proceeding, and that she had a traffic infraction in 2009. Juror No. 9 failed to disclose that he had been convicted of two misdemeanors over ten years before, and that he was a plaintiff in a county court case that was dismissed for lack of prosecution. Finally, Juror No. 16 failed to disclose that he was a defendant in an indebtedness case. The trial court denied the motion and the Plaintiffs appealed.

APPELLATE DECISION

The Fourth District affirmed, explaining that post-trial juror interviews should be rarely granted, except when there are reasonable grounds to believe concealment of a material fact has taken place. Therefore, post-trial jury inquiry is permissible only when the moving party has made sworn, factual allegations that, if true, would require a trial court to order a new trial. Further, when the basis of a request for post-trial juror's interviews is a juror's nondisclosure of information during voir dire, the motion should demonstrate entitlement to a new trial under the three-part test outlined in *De La Rosa v. Zequeira*:[7]

> (1) The complaining party must establish that the information is relevant and material to jury service in the case;
> (2) The complaining party must establish that the juror concealed the information during questioning; and
> (3) The complaining party must establish that the juror's failure to disclose the information was not attributable to the complaining party's lack of diligence.

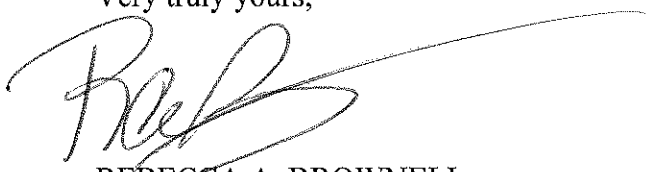
The Court held that the Plaintiffs failed to meet the third element of the test. Specifically, the Court found that Plaintiffs' counsel's questioning of the jurors was imprecise and not designed to elicit the type of information that was supposedly concealed. The Court noted that there was no indication that the previous litigation experiences of the jurors were of the type the jurors understood to be court proceedings, as most litigation is resolved before physically stepping into court. Additionally, there was no indication that three of the jurors had been sued for breach of contract or promissory note, which were the only types of civil cases the jurors

[7] 659 So. 2d 239, 241 (Fla. 1995) (citing *Skiles v. Ryder Truck Lines, Inc.*, 267 So. 2d 379, 380 (Fla. 2d DCA 1972)).

were specifically asked about. Finally, the Court found that there was insufficient proof that Juror No. 4, the juror with the common name, was the same person involved in all of the previous civil cases. The Court concluded that a differently phrased, follow-up question may have resulted in her disclosure of this information. Therefore, the Court affirmed the Fourth District's denial of the motion to interview the jurors.

We hope that you find these case and rulings of interest. If there is a particular issue, statute, or rule of law that you have an interest in, please let us know so we can highlight those cases for you in our future case summaries. Should you have any questions with respect to the foregoing, please do not hesitate to contact the undersigned at your earliest convenience.

Very truly yours,



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