

**ATKINSON &
BROWNELL P.A.**
ATTORNEYS AT LAW

One Biscayne Tower, Suite 3750, 2 South Biscayne Blvd. Miami, FL 33131

August 15, 2012

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 *GlobeTec Construction, LLC v. Custom Screening & Crushing, Inc.*, the Third District Court of Appeal held that pursuant to basic contractual principles, (1) no agreement can bind a non-signatory, and (2) where there is no contract between the parties, there can be no cause of action for fraudulent inducement.

In *Poland v. Zaccheo*, the Fourth District Court of Appeal held that while a trial judge may impose reasonable limitations on cross-examination, the judge must permit a full and fair cross-examination of matters testified to on direct examination.

In *Kadlecik v. Haim*, the Fifth District Court of Appeal held that under Florida's Wrongful Death Act, an estate's personal representative is the sole party who may bring an action on behalf of the estate and the decedent's survivors, and the survivors are not parties to the wrongful death litigation. Accordingly, it is error to award attorneys' fees against the survivors when a personal representative rejects a reasonable offer of settlement because the personal representative is the sole person with authority to settle the claim and therefore, the individual survivors cannot be fairly said to have rejected the offer.

In *Publix Super Markets v. Anderson*, the Fourth District Court of Appeal held that, pursuant to Florida Rule of Civil Procedure 1.280(b)(3), incident reports and witness statements prepared by retail stores immediately after an incident on the premises are prepared in anticipation of litigation and are not discoverable unless the opposing party demonstrates that it is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means, such as through depositions.

I. *GlobeTec Construction, LLC v. Custom Screening & Crushing, Inc.*, 77 So. 3d 802 (Fla. 3d DCA 2011).

FACTS AND PROCEDURAL HISTORY

GlobeTec Construction, LLC (“GlobeTec”), a Florida limited liability corporation, formed a foreign company, GlobeTec Panama, S.A. (“Panama”). GlobeTec Panama entered into a mining contract with Minas y Agregados (“Minas”), a foreign company formed by the CEO of Custom Screening and Crushing, Inc. and Custom Screening and Material, Inc. (collectively, “Custom”). A conflict in operation occurred between Panama and Minas and those companies entered into arbitration pursuant to the contract. Custom filed suit against GlobeTec for fraud in the inducement based upon the contract entered into between Panama and Minas.

Custom acknowledged that it was not a signatory to the contract between Panama and Minas. In response, GlobeTec moved to enforce the contract’s arbitration clause. The trial court denied the motion, noting that Custom was not a party to the contract and therefore could not be compelled to arbitrate by its terms. GlobeTec appealed.

APPELLATE COURT DECISION

The Third District held that an arbitration agreement of the kind at issue here could not be enforced against a non-party. The Court explained that GlobeTec, a non-signatory to the mining contract, could not compel Custom to arbitration, as Custom, which is also a non-signatory, did not agree to the arbitration agreement. Based on similar reasoning, the Court explained that Custom’s cause of action for fraud in the inducement must fail because in such a cause of action, the plaintiff must show that the fraudulent act induced the formation of the contract between the parties. Here, where there is no contract between the parties, Custom cannot demonstrate fraudulent inducement.

II. *Audra W. Poland & Steven Poland v. Susan S. Zaccheo*, 82 So. 2d 133 (Fla. 4th DCA 2012)

FACTS AND PROCEDURAL HISTORY

On February 17, 2006, Audra Poland (“Poland”) came to a stop near an intersection when Susan Zaccheo’s (“Zaccheo”) SUV impacted the rear of Poland’s automobile. For a few months following the automobile accident, Poland complained of persistent pain in her back and neck, undergoing two surgeries. Despite the surgeries, Poland continued to experience severe back pain and muscle spasms.

At trial, Zaccheo called a board-certified orthopedic surgeon to opine that the automobile accident had caused only a temporary cervical strain on Poland, and that the majority of her injuries were attributable to preexistent disc bulges and degeneration associated with her morbid obesity. Zaccheo’s witness concluded that Poland suffered no permanent injuries to her neck and back as a result of the accident, and that she would have no need for any future treatment. On cross-examination, Poland’s attorney attempted to question Zaccheo’s witness on his opinion

as to whether Poland's surgeries were related to the automobile accident. Zaccheo's attorney objected to this testimony. The trial court sustained the objection. On re-direct, Zaccheo's attorney elicited testimony from the witness that it would be unusual or improbably for a person to get multiple-level injuries from a car accident, and that there was another proximate cause for Poland's impairment and injuries.

The jury found both parties negligent, assigning Zaccheo 90% of the blame and Poland 10%. The jury awarded Poland \$10,000.00 for past medical expenses and \$4,400.00 for past lost earnings. However, the jury concluded that Poland did not sustain a permanent injury within a reasonable degree of medical probability as a result of the accident, and therefore, awarded no future medical expenses or lost earnings, nor any damages for pain and suffering. Poland appealed.

APPELLATE COURT DECISION

On appeal, the Fourth District cited Section 90.612(2), Florida Statutes, which states that the cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Court noted that cross-examination is not confined to the identical details testified to on direct, but extends to its entire subject matter, including all matters that may modify, supplement, contradict, rebut, or clarify the facts testified to on direct examination.

According to the Court, the trial judge in this case limited the scope of the cross-examination of Zaccheo's final witness regarding the proximate cause of Poland's injuries, finding that, at a minimum, the trial court should have allowed Poland's attorney to fully explore the witness' opinion regarding the causation of Poland's injuries in order to refute the notion that Poland's damages were not proximately caused by the automobile accident. The Court explained that, while a trial judge may impose reasonable limitations on cross-examination, the trial judge must nonetheless permit a full and fair cross-examination of matters testified to on direct examination. Therefore, the Court held that the trial court's denial of full, cross-examination of Zaccheo's medical expert regarding the proximate cause of Poland's injuries and resulting surgeries, a central and contested issue at trial, warranted reversal and remand for a new trial.

III. *Charles Kadlecik v. Daniel Haim, M.D. & Central Florida, Etc.*, 79 So. 3d 892 (Fla. 5th DCA 2012)

FACTS AND PROCEDURAL HISTORY

Charles Kadlecik's ("Kadlecik") wife died during a medical procedure performed by Dr. Haim at Florida Hospital. Kadlecik, as personal representative of his wife's estate, filed a wrongful death claim against the appellees and Florida Hospital seeking survivor damages and the Estate's loss of net accumulations. After the claims against Florida Hospital settled, Kadlecik apportioned the entire settlement to his sole survivor claims.

Before trial, the appellees served proposals for settlement on Kadlecik, as personal representative of the Estate, all of which were rejected. The wrongful death claim proceeded to jury trial, resulting in a judgment in favor of the appellees, which was affirmed on appeal. The trial court awarded attorneys' fees and costs of \$202,592.00 against Kadlecik as personal representative of the Estate for failing to accept the proposals for settlement, which was also affirmed on appeal. Then, the appellees petitioned the probate court to apportion Florida Hospital's settlement proceeds for the amount of their fee awards; or, in the alternative, to surcharge the personal representative. The trial court ordered Kadlecik to pay the awarded attorneys' fees sixty (60) days prior to distributing the remaining settlement proceeds and assets to himself as the sole survivor.

Kadlecik appealed, claiming that the attorney's fees awarded against the personal representative cannot be recovered against funds allocated to a survivor under Florida's Wrongful Death Act.

APPELLATE DECISION

Kadlecik argued that the attorney's fees awarded against the personal representative cannot be recovered against funds allocated to a survivor under Florida's Wrongful Death Act because survivors are not parties to the wrongful death litigation even though the claims are brought for their benefit. The appellees argued that allowing a survivor to escape all liability to a prevailing defendant in a wrongful death action is contrary to the Section 768.26, Florida Statutes, which states:

Attorneys' fees and other expenses of litigation shall be paid by the personal representative and deducted from the awards to the survivors and the estate in proportion to the amounts awarded to them, but expenses incurred for the benefit of a particular survivor or the estate shall be paid from their award.

Id. The District Court explained that, although this provision allows for the deduction of litigation expenses from awards made to survivors, it only applies to fees and costs incurred by attorneys representing the survivor, and not for attorneys representing the prevailing defendant. The Court noted that under Florida's Wrongful Death Act, an estate's personal representative brings all claims on behalf of both the Estate and the decedents' survivors. The survivors are not parties to the wrongful death litigation, even when the claims are brought for their benefit. Accordingly, the Court held, the trial court erred in awarding attorneys' fees against the survivors because the personal representative is the only person with authority to settle the claim, and therefore, the individual survivors cannot be fairly said to have rejected an offer of settlement.

Further, the District Court explained that a prevailing defendant in a wrongful death case may recover from the Estate when the personal representative rejects a reasonable offer of settlement; therefore, the trial court properly awarded attorneys' fees and costs against the Estate. However, where an Estate has no viable claim in a wrongful death matter, the trial court cannot require that the personal representative apportion money to it. Therefore, the Court held, the trial court's requirement that Kadlecik pay the appellee's fee claim before distributing the remaining

settlement proceeds to himself as the sole survivor is contrary to current law and improper, as it required that the claim against the Estate be paid from funds collected for the benefit of the survivor. Finally, the Court noted that Kadlecik's status as both the personal representative and the sole survivor did not change the analysis.

IV. *Publix Super Markets, Inc. v. Linda Anderson*, Case No. 4D12-103, 2012 Fla. App. LEXIS 12119 (Fla. 4th DCA July 25, 2012)

FACTS AND PROCEDURAL HISTORY

Plaintiff, Linda Anderson ("Anderson"), slipped and fell at a Publix grocery store and sued. During the discovery phase, Anderson sought "any and all reports concerning the incident identified in the plaintiff's complaint." Publix asserted a work-product privilege and its privilege log identified two (2) documents, both of which were prepared the day of Anderson's fall: a report of the incident by the assistant store manager and a customer incident witness statement of a customer services staff associate. The trial court reviewed the reports in camera, and subsequently ordered their production. Publix sought certiorari review of the order.

APPELLATE DECISION

In its analysis, the District Court cited Florida Rule of Civil Procedure 1.280(b)(3), which provides that a party may obtain work product, or materials "prepared in anticipation of litigation . . . only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." The District Court noted that both the incident report and the witness statement expressly stated that they were "prepared in anticipation of a claim or litigation" and that they are "confidential." After reviewing the documents, the District Court agreed that these items were prepared in anticipation of litigation, and noted that such reports and employee statements, created *after* a slip and fall has been reported to the retail store, are not prepared because of some "morbid curiosity" about how people fall in store premises. Instead, the Court explained, experience has shown retail stores that people who fall in their stores try to be compensated for their injuries, and that "bogus or exaggerated" claims might be made. Further, that a potential defendant's right to fully investigate and memorialize the results of the investigation should not be restricted any more than should a potential plaintiff's. Therefore, the Court quashed the order, holding that Publix has met its burden and Anderson had not demonstrated that she is unable to obtain the substantial equivalent of the material by other means, such as through depositions.

Very truly yours,



REBECCA A. BROWNELL
JAMIE B. GELFMAN