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**SUMMARY JUDGEMENT APPROPRIATE IN
RETALIATORY DISCHARGE CLAIM ON GROUND
EMPLOYEE DID NOT MAKE VALID CLAIMS FOR EITHER
WORKERS' COMPENSATION OR ATTEMPT TO CLAIM COMPENSATION**

Villavicencio v. Siemens Power Transmission, and Distribution, Inc., 29 Fla. L. Weekly D588 (Fla. 3d DCA March 10, 2004)

The 3d DCA affirmed summary judgment for the employer in a retaliatory discharge action pursuant to F.S. ' 440.205. The trial court entered summary judgment on the ground that the plaintiff made neither a "valid claim for compensation or attempt to claim compensation under the workers' compensation law." As such, the plaintiff was not entitled to invoke the protection of the statute. No facts were supplied for this opinion.

**DUTY OWED TO THIRD PARTIES BY ELECTRIC
UTILITY OWNER - SUMMARY JUDGMENT IMPROPER**

Dolan v. Florida Power & Light Company, 29 Fla. L. Weekly D596 (Fla. 4th DCA March 10, 2004)

Summary judgment entered in behalf of Florida Power and Light was appealed and the summary judgment was reversed based upon the Florida Supreme Court's recent decision in *Clay Electric Cooperative, Inc. v. Johnson*, 28 Fla. L. Weekly S866 (Fla. December 18, 2003)

Dolan was fatally injured in a motorcycle accident at an intersection in Boca Raton. His wife filed a two-count complaint against FPL alleging that 1) FPL owned an overhead streetlight at the scene of the accident; 2) the streetlight had not been functioning properly at the time of the accident; and 3) FPL had been notified of the malfunction prior to the accident. Dolan claimed that FPL owed a duty of care to her husband in its maintenance of the streetlight, that it breached that duty by failing to properly maintain the streetlight and that its breach of the duty of due care created a dangerous condition which was the proximate cause of the accident.

FPL filed affirmative defenses, among them was the defense that it neither owed nor breached any duty to Dolan. FPL filed a motion for summary judgment in which it alleged that it did not owe a general duty to the public to supply street lighting or electric current thereto. Therefore, FPL claimed that even when the loss of a streetlight is a result of negligence on the part of the power company, that negligence cannot, as a matter of law, constitute a breach of duty owed to a plaintiff involved in an accident allegedly because of the streetlight malfunction.

The initial motion for summary judgment filed by FPL was denied and it then filed a second motion for final summary judgment which was granted. After briefing and oral argument, the 4th DCA stayed the case pending the Florida Supreme Court's resolution of the same issue in *Clay Electric supra*, and its companion case, *Martinez v. Florida Power and Light Company*, 863 So. 2d 1204 (Fla. 2003).

In *Clay Electric* the Florida Supreme Court held that an electric utility which undertakes to provide street lighting owes a duty to third persons for physical harm resulting from the failure to exercise reasonable care in this undertaking, relying upon Restatement (Second) of Torts ' 324A (1965). That subsection limits liability on the part of an "undertaker," so that liability only exists, if:

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is separate because of reliance of the other or the third person on the undertaking.

The court in *Clay Electric* held that the "increased risk" subsection of the Restatement was satisfied on that summary judgment record, because it was a negligence **maintenance** (not a negligence installation) case, thus comparing the risk to the "normal" lighted condition not the natural darkness. Thus, a jury question was raised as to whether the electric company's negligence increased the risk of harm in that case to a pedestrian.

The appellate court held that this case was controlled by *Clay Electric* and the first prong of the Restatement posed a jury question here since facts of record clearly show that this too was in the nature of a negligent maintenance case. Therefore, summary judgment was reversed.

**DAMAGES - WHEN PROVIDER CHARGES
FOR MEDICAL SERVICE OR PRODUCTS AND
LATER ACCEPTS LESSER SUM IN FULL SATISFACTION
BY MEDICARE, ORIGINAL CHARGE BECOMES IRRELEVANT**

Thyssenkrupp Elevator Corporation v. Lasky, 29 Fla. L. Weekly D608 (Fla. 4th DCA March 10, 2004)

On motion for rehearing of the original opinion reported at 29 Fla. L. Weekly D103 and discussed in our summary of the January 9, 2004 Florida Law Weekly, the 4th DCA wrote to comment on plaintiff's post-opinion argument that the court's decision in this case would allow a setoff for collateral sources and is contrary to the involved statute. The pertinent part of the opinion had stated:

The result, defendant argues, is that this difference is either inadmissible as "damages" suffered by plaintiff or that a setoff is required by F.S. ' 768.76 because this is an unwarranted surplus damage awarded to plaintiff. We agree.

The 4th DCA noted that it should have taken care to make clear that their agreement applied only to the evidentiary issue, not to any setoff argument. The appellate court clarified its opinion to state that the precise objection raised by defendant, which it held should have been sustained by the trial judge, was that a plaintiff has suffered no damaged from the higher charge by the provider when it later accepts a Medicare payment in full satisfaction of the charge. The appellate court noted that its reliance on *Florida Physicians Insurance Reciprocal v. Stanley*, 452 So. 2d 514 (Fla. 1984), demonstrated that it saw this as an issue pertaining to the admission of evidence, not really as a setoff.

Thus, the 4th DCA noted that its actual holding should be understood as an evidentiary ruling. The appellate court held that when a provider charges for medical service or products and later accepts a lesser sum in full satisfaction by Medicare, the original charge becomes irrelevant because it

does not tend to prove that the claimant has suffered any loss by reason of that charge.

**MEDICAL MALPRACTICE - TRIAL COURT
PROPERLY CONCLUDED THAT LETTER SENT
TO DEFENDANT BY PLAINTIFF'S FORMER ATTORNEY
CONSTITUTED NOTICE OF INTENT TO INITIATE AND THUS
STATUTE OF LIMITATIONS EXPIRED AT TIME COMPLAINT FILED**

Creel v. Danisi, M.D., 29 Fla. L. Weekly D615 (Fla. 1st DCA March 11, 2004)

Final summary judgment was entered in favor of Dr. Danisi on the basis that the statute of limitations had expired prior to the filing of the plaintiff's complaint alleging medical malpractice. The parties agreed that the statute of limitations began to run on May 22, 2000 when Dr. Danisi performed cosmetic surgery on Ms. Creel. The Creels filed their complaint on October 14, 2002. The Creels argued that the trial court erred in concluding that a letter sent by their former attorney to Dr. Danisi in September 2001 constituted a notice of intent under the applicable statutes in Chapter 766, Florida Statutes (1999).

The letter stated in its first paragraph:

This letter is to inform you that I have the privilege of representing Janet Creel for injuries she sustained as a result of your negligence on May 22, 2000. I am notifying you in accordance with F.S. ' 766.203 that she intends to pursue a medical malpractice action against you arising out of the injuries sustained on May 22, 2000.

The letter also contained other information at the end regarding a proposal for settlement, but the appellate court stated that information did not change the character of the letter and the language of the letter clearly and plainly indicated that the purpose of the letter was to inform Dr. Danisi that Mrs. Creel intended to sue for medical malpractice.

The Creels' argument was that the first letter was not a notice of intent and therefore the statute of limitations was not tolled until their subsequent attorneys filed a notice of intent.

The appellate court held that in the absence of any notice of intent the statute of limitations would have expired on May 22, 2002, because the September 2001 letter constituted a notice of intent, the statute of limitations expired on August 20, 2002 and as the Creels did not file their complaint until October 14, 2002, the trial court properly determined that the statute of limitations had expired at that point.

**NON-FINAL ORDERS - ORDER NOT FINAL
WHERE RELATED SUBSTANTIVE COUNTS REMAIN PENDING**

Couch and Todd v. Tropical Breeze Resort Association, Inc., 29 Fla. L. Weekly D615 (Fla. 1st DCA March 11, 2004)

The order for which the appellants sought review was captioned as a final judgment. However, the order appealed adjudicated the merits of Counts VII and IX only and the other Counts, I through VI, VIII, and X through XIII remained pending. In addition, in regard to Counts VII and IX, the order reserved jurisdiction to hold a trial on the issue of punitive damages. Therefore, the appellate court held that this was a non-final order and dismissed it for lack of jurisdiction.

**NON-FINAL ORDER - ORDER WHICH RESERVED
JURISDICTION TO DETERMINE COLLATERAL SOURCE SET-OFFS NON-FINAL**

Hamilton v. Ryan Foods Company, 29 Fla. L. Weekly D617 (Fla. 1st DCA March 11, 2004)

The appellate court dismissed this appeal as premature as the order on appeal reserved jurisdiction to determine collateral source set-offs and was therefore a non-final order.

DISMISSAL FOR FAILURE TO PROSECUTE

Seabury v. Cheminova, Inc., 29 Fla. L. Weekly 621 (Fla. 2d DCA March 12, 2004)

The plaintiffs appealed a dismissal of their case for lack of prosecution pursuant to Fla.R.Civ.P. 1.420(e). They argued that although there was no activity on the face of the record for the year preceding the motion to dismiss, their prosecution of a related federal court case precluded dismissal. The appellate court rejected the argument and affirmed.

A class action complaint was filed against Cheminova for damages sustained as a result of spraying of Cheminova's product, Fyfanon, during the Medfly Eradication Program of 1997 and 1998. Their counts included strict products liability, negligence per se, negligence, negligent infliction of emotional distress, and toxic trespass.

The defendants filed a motion to dismiss or stay the state court action on the ground that a pending federal court action was essentially identical to the action filed by plaintiff's counsel against the same three defendants. The plaintiffs opposed a stay but contended that a stay was proper only when their related litigation was between the same parties on the same issues and where the courts involved have concurrent jurisdiction over the same parties and the same subject matter. However, the plaintiffs contended that there was no

pending litigation in any other court between these plaintiffs and these defendants in regard to the state court matter.

The federal court plaintiffs' injuries were of much greater severity than the state court plaintiffs and the state court plaintiffs could not meet the \$75,000 federal court jurisdictional threshold. In the conclusion of their memorandum in opposition to a stay, the state court plaintiffs asserted that neither the plaintiffs in this state court suit nor the classes they sought to represent had claims pending before any other court.

Ironically, this theory utilized by the plaintiff prevented a stay of the action when sought by the defendants but it also formed the basis for a finding that they could not avoid dismissal for failure to prosecute on the ground of a related court action.

The appellate court noted that when a motion to dismiss for failure to prosecute is filed pursuant to Rule 1.420(e), the defendant is first required to show there has been no record activity for the year preceding the motion and second, if there has been no record activity, the plaintiff has the opportunity to establish good cause why the action should not be dismissed. To establish good cause, the plaintiff must show that its nonrecord activities were done in good faith and moved the case forward to a conclusion. In this case, the plaintiffs relied upon their prosecution of the **Rink** action to establish good cause, but they failed to do so because the **Rink** case did not share identical parties and claims with this case.

The appellate court noted that a number of cases examined whether the pendency of a related action can provide justification for apparent nonactivity in a case subject to dismissal for failure to prosecute. They noted that other cases that followed the rule that pendency of a parallel lawsuit involving the same parties constitutes good cause to avoid dismissal, but stated that the parties were not identical in this case and the state court parties were asserting claims different in nature and degree from those filed by the federal court plaintiffs.

The appellate court noted that several common threads arise in cases where the courts have found that the plaintiff's failure to prosecute its lawsuit constituted good cause to avoid dismissal when related cases were pending. If the parties and claims are identical or if the cases have been consolidated for discovery and trial, or if something in the related case prevented the dormant action from proceeding, like an agreement to stay pending appeal, the courts will more favorably look on the plaintiff's good cause argument. However, this case was distinguishable from the cases where dismissal was avoided in that the same plaintiffs did not sue the same defendants for different claims in different forums.

The appellate court also noted that the trial court's good cause determination in the context of Rule 1.420(e) is reviewed under the abuse of discretion standard. On the one hand, it noted that the chief concern of the

court should not be resolution for the sake of finality only, but it should be to render justice based upon the merits of the action in a timely, thoughtful manner, but on the other hand, the defendants' concerns must also be considered. As Justice Wells pointed out:

The defendants' interests must be protected and should be of equal concern to our courts as are the interests of those who, by paying a filing fee, become plaintiffs and have the power to have these defendants brought into court. It is a reality that being sued is costly to the party sued in money, emotion, time, and many other tangible and intangible ways. This is true even when the suit is totally meritless.

The appellate court held that where the plaintiffs allowed the lawsuit to linger for more than a year preceding the filing of the motion to dismiss for failure to prosecute, the trial court did not abuse its discretion and the plaintiffs' reliance upon their attorneys' pursuit of the same defendants for different claims in a federal court case did not constitute good cause for their failure to move the case toward resolution.

**COURT ERRED IN AWARDING DEFENDANT
ATTORNEY'S FEES PURSUANT TO OFFER OF JUDGMENT STATUTE**

Wagner v. Uthoff, M.D., 29 Fla. L. Weekly D623 (Fla. 2d DCA March 12, 2004)

Attorney's fees and costs were awarded to Dr. Uthoff pursuant to an offer of judgment and pursuant to F.S. ' 57.105.

Mr. Wagner brought an action against Dr. Uthoff for damages resulting from an alleged breach of an oral agreement and fraud in the inducement of an oral agreement. The trial court dismissed the action based upon the determination that Mr. Wagner was a resident of Germany who had never posted a nonresident cost bond pursuant F.S. ' 57.011. Mr. Wagner appealed the issue and this appellate court reversed the order which dismissed Mr. Wagner's complaint because the cash bond required by F.S. ' 57.011 had in fact been timely filed.

While the appeal was pending, Dr. Uthoff was granted attorney's fees by the trial court based upon an offer of judgment and F.S. ' 57.105. Mr. Wagner appealed the final judgment for attorney's fees and costs. Dr. Uthoff conceded on appeal that the portion of the judgment awarding attorney's fees pursuant to the offer of judgment must be reversed because the underlying judgment was reversed. Dr. Uthoff's motion, filed pursuant to F.S. ' 57.105, requested fees and costs based upon the allegation that there was a complete absence of any justiciable issue of fact in the complaint and he sought fees and costs incurred in litigating the issue of Mr. Wagner's foreign residency.

As there was no ruling on the merits of the complaint and the dismissal was based on a technical failure to file a bond, the appellate court held that the attorney's fees which were awarded based upon the invalidity of the complaint must be reversed.

The same was not true for the claim for attorney's fees relating to the issue of Mr. Wagner's residency. The appellate court held that the trial court properly awarded Dr. Uthoff attorney's fees incurred in litigating the residency issue. The appellate court held that the trial court properly awarded Dr. Uthoff the attorney's fee because Mr. Wagner knew or should have known that his 2002 affidavit was false and that Dr. Uthoff had conducted discovery and obtained Mr. Wagner's 1997 tax return which indicated during that year he had been a resident of Germany.

In January 2000 when Mr. Wagner filed his affidavit relating to residency, F.S. ' 57.105 stated that attorney's fees should be paid to the prevailing party on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party knew or should have known that a claim or defense when initially presented to the court at any time before trial was not supported by the material facts necessary to establish the claim or defense or would not be supported by the application of then existing laws to those material facts.

The portion of the trial court's order awarding Dr. Uthoff attorney's fees pursuant to F.S. ' 57.105 was affirmed only as to those fees relating to the issue of Mr. Wagner's residency. The appellate court instructed the trial court on remand to determine the amount of fees and costs incurred for litigating this issue alone and it reversed the award of attorney's fees in all other respects.

**OFFER OF JUDGMENT - ORDER FINDING ENTITLEMENT
OF FEES BUT NOT SETTING AMOUNT IS NONFINAL AND NONAPPEALABLE**

Salem v. Abram, 29 Fla. L. Weekly D628 (Fla. 2d DCA March 12, 2004)

Salem appealed a final judgment following a jury trial on her claim arising from an automobile accident. She argued that the trial court erred by denying her motion for additur or motion for new trial. The appellate court affirmed the denial of the motion for additur or new trial without comment.

Salem also appealed the trial court's determination that the defendants were entitled to recover attorney's fees pursuant to their proposal for settlement. The trial court found that the offer of judgment was proper and that the defendants were entitled to attorney's fees based on that offer but it reserved jurisdiction to determine the amount. The appellate court held because the trial court's order only determined entitlement to fees and did not set the amount of fees, it was a nonfinal and nonappealable order. It dismissed the attorney's fee issue without prejudice.

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