

**PUBLICATION PROVIDED BY:**  
**RISSMAN, WEISBERG, BARRETT,  
HURT, DONAHUE & McLAIN, P.A.**

**FLORIDA LAW WEEKLY**

**MAY 28, 2004**

**SOVEREIGN IMMUNITY - DOE HAD COMMON LAW  
DUTY TO PROTECT MINOR STUDENT FROM SEXUAL ABUSE  
BY TEACHER - ERROR TO GRANT DOE'S MOTION TO DISMISS**

*Ingram v. Wylie*, 29 Fla. L. Weekly D1198 (Fla. 1st DCA May 18, 2004)

Ingram appealed an order granting Department of Education's (DOE) motion to dismiss based on sovereign immunity. Ingram alleged that DOE had negligently reissued Wylie's teaching certificate, resulting in Wylie taking sexual advantage of Ingram.

Ingram alleged that in 1988, DOE had permanently revoked Wylie's teaching certificate based upon a finding that he had impregnated a minor student while he was employed as a teacher in Polk County. Three years before his certificate was permanently revoked, DOE had also received a report that Wylie had allegedly been romantically involved with a different minor female student.

Ingram claimed that in 1994 Wylie had applied for a temporary teaching certificate, which DOE granted. In 1996, he became fully certified. During the 1998-1999 school year, when Ingram was 15 and 16 years old, she was a student in Wylie's high school class in Pinellas County. Wylie had a sexual relationship with Ingram when she was 16 years old.

Ingram claimed that DOE knew or should have known of Wylie's history of inappropriate sexual relationships with minor female students, and that his teaching certificate had been permanently revoked. Consequently, according to Ingram, DOE had breached its duty to protect the interests of students and parents by reissuing Wylie's teaching certificate, thereby creating a known dangerous condition, unknown to Ingram. Further, Ingram claimed that DOE breached its duty to warn Ingram or protect her from Wylie, a known danger to minor female students. As such, Ingram claimed that DOE had breached a common law duty of care.

The 1st DCA first noted that DOE cannot be liable in tort unless a common law or statutory duty of care existed that would have applied to an individual under similar circumstances. The 1st DCA held that providing educational services to citizens is not necessarily a discretionary function of government because educational services are performed by private citizens as well as governmental entities. Hence, the 1st DCA held that DOE had a common law duty to Ingram to protect her from Wylie. The 1st DCA noted that sovereign immunity from tort liability is waived for negligent activities that are operational and for which a common law or statutory duty of care exists.

At issue is the reissuance of Wylie's teaching certificate. DOE was alleged to be negligent in reissuing the teaching certificate, having previously permanently revoked Wylie's teaching privileges. This alleged negligence was caused by the manner in which DOE's policies were implemented and is not subject to sovereign immunity protection.

The 1st DCA held that DOE is not protected by sovereign immunity and, therefore, DOE's motion to dismiss was improperly granted.

**TORTS - NEW TRIAL - DAMAGES - WHERE  
JURY VERDICT FOUND NO INJURY TO PLAINTIFF,  
BUT EVIDENCE OF ORTHOPEDIC AND SOFT TISSUE  
INJURY UNCONTROVERTED, ERROR TO ORDER NEW TRIAL AS  
TO ALL CLAIMED INJURIES BUT SHOULD BE LIMITED TO DAMAGES  
RELATED TO PLAINTIFF'S ORTHOPEDIC AND SOFT TISSUE INJURIES ONLY**

*The Hertz Corporation v. Gleason*, 29 Fla. L. Weekly D1208 (Fla. 4th DCA May 19, 2004)

Hertz appealed a new trial order entered after a jury found the plaintiff had not sustained injury as a result of an accident in which Hertz had

stipulated to liability. Hertz sought reversal of the order and reinstatement of the jury verdict. Alternatively, Hertz requested that the new trial be limited to damages for orthopedic and soft tissue injuries only.

Gleason was a back seat passenger in an automobile owned by Hertz. The driver lost control of the vehicle and rolled over several times at a high rate of speed. Gleason, who was 14 years old at the time of the accident, did not seek medical treatment for eight hours. He did complain of pain in his head, neck, arm, shoulder and hip at the scene of the accident. At the hospital, however, he complained only of left shoulder pain, a bruised left hip and tenderness of the spine. He was diagnosed with a cervical sprain and contusions of the hip and shoulder.

Three days after the accident, Gleason saw a chiropractor and complained of neck, low back and chest pain. He later received a neurological evaluation 19 days following the accident but continued to see the chiropractor for several months.

The neurologist found no abnormalities on CT-scan or an EEG but believed there may have been an orthopedic impairment as a result of the accident.

Over the next few years, Gleason relocated to Virginia, Orlando, Utah, Orlando and Mt. Dora. During that time, Gleason developed an antisocial and irresolute personality and a decline in his academics. In Orlando, a doctor concluded that there was evidence of brain damage in the frontal lobe area and significant executive dysfunction. The doctor diagnosed traumatic brain injury and opined that Gleason's disruptive behavior resulted from that injury.

According to an independent medical exam, Gleason had no brain damage or neurological impairment.

At the conclusion of the nine-day trial, the jury answered "no" to the following question: "Was the subject motor vehicle accident a legal cause of damage to the plaintiff, Matthew Gleason?" After entry of final judgment pursuant to the verdict, Gleason moved for a new trial, which the trial court granted.

Hertz argued on appeal that the trial court improperly sat as a "seventh juror" when it granted the motion for new trial based on its finding that the jury disregarded "undisputed" testimony to the effect that the motor vehicle accident legally caused orthopedic and soft tissue damages. Gleason responded that the undisputed evidence established that he sustained orthopedic and soft tissue injuries as a result of the accident. Thus, the jury's finding of no liability was contrary to the manifest weight of the evidence, and required a new trial.

The 4th DCA noted that the most significant disputed issue at trial was whether the plaintiff had suffered any neurological damage as a result of the

accident. The evidence sharply conflicted on this issue. However, both plaintiff's and defendant's experts agreed that the plaintiff sustained some orthopedic and soft tissue injury as a result of the accident.

F.S. § 59.35 (2003) provides:

An appellate court may, in reversing a judgment of a lower court brought before it for review by appeal, by the order of reversal, if the error for which reversal is sought is such as to require a new trial, direct that a new trial be had on all the issues shown by the record or upon a part of such issues only. When a reversal is had, with direction for new trial on a part of the issues, all other issues shall be deemed settled conclusively in favor of the appellee.

The 4th DCA held that the plaintiff's request for damages for closed-head injuries was directly contradicted by the evidence. In short, there was a disputed question of fact, which lies within the province of the jury. However, there was no dispute that the plaintiff had sustained some injury. Therefore, the trial court correctly determined that the verdict was against the manifest weight of the evidence, but should have limited the new trial to damages for orthopedic and soft tissue injuries.

Reversed and remanded to the trial court for entry of an order limiting the new trial consistent with this opinion.

**CIVIL PROCEDURE - DISMISSAL -  
ERROR TO DISMISS ACTION BECAUSE PLAINTIFF  
FILED UNILATERAL PRETRIAL STATEMENT AFTER DEFENDANT  
REFUSED TO AGREE TO PROFFERED JOINT PRETRIAL STATEMENT -  
PLAINTIFF'S FAILURE TO COMPLY WITH PRETRIAL ORDER NOT WILLFUL**

***Sullivan v. Communications, Concepts and Investments, Inc.***, 29 Fla. L. Weekly D1211 (Fla. 4th DCA May 19, 2004)

Sullivan appealed an order dismissing his case because he filed a unilateral pretrial statement, after defendants refused to agree to his proffered joint pretrial statement. Although the dismissal order stated it was without prejudice, the statute of limitations had run.

At a case management conference requested by defendants, in which they alleged that Sullivan's counsel was not cooperating at a joint pretrial order, defense counsel advised the court that he objected to the joint stipulation he received from plaintiff's counsel because it was not concise and impartial. Plaintiff's counsel replied that defense counsel had not timely responded to his proposed joint pretrial stipulation, and he filed the unilateral statement as a precaution, in case they could not ultimately agree. The trial court refused to accept plaintiff's counsel's explanation and found that plaintiff

was in violation of a pretrial order requiring a joint pretrial stipulation. The trial court dismissed plaintiff's claim without prejudice.

Later, when the trial court was advised by both sides that the dismissal would require a finding of willfulness, the court replied that they were wrong, that willfulness was not necessary.

On appeal, defendants' conceded that the order must be reversed because the trial court had made no findings that the failure to comply with the pretrial order was willful, but contended that the matter should be remanded for the trial court to make the findings which would warrant dismissal.

The 4th DCA held that under the facts of this case, in which the initial proposed joint stipulation was rejected by defense counsel, and nothing significant occurred thereafter, the failure to file the joint stipulation could not have been willful.

**TORTS - AUTOMOBILE ACCIDENT -  
SUMMARY JUDGMENT - COURT PROPERLY  
GRANTED SUMMARY JUDGMENT FOR DEFENDANT WHERE  
NO COMPETENT EVIDENCE DEFENDANT WAS NEGLIGENT -  
TESTIMONY OF PASSENGER THAT DEFENDANT MUST HAVE  
BEEN SPEEDING BASED ON CRASH DAMAGE TO PLAINTIFF'S  
VEHICLE NOT COMPETENT EVIDENCE BECAUSE PASSENGER NOT  
QUALIFIED AS EXPERT - COURT DID NOT ABUSE DISCRETION  
IN DENYING MOTION FOR CONTINUANCE OF SUMMARY JUDGMENT  
HEARING WHEN PLAINTIFF DID NOT PRODUCE EXPERT AFFIDAVIT  
TO COUNTER EVIDENCE OF NON-NEGLIGENCE PRESENTED BY DEFENDANT**

**Castro v. Brazeau**, 29 Fla. L. Weekly D1214 (Fla. 4th DCA May 19, 2004)

Castro challenged a final summary judgment entered in a personal injury action arising from an automobile accident. Castro contended that material issues of fact remain because of eye witness testimony to the accident. He also argued that the trial court erred in failing to grant a continuance of the summary judgment hearing when he did not produce an expert affidavit countering the evidence of non-negligence presented by the defendant.

Castro was driving with two passengers on I-95 in Broward County when his vehicle hit a metal object in the road, causing a tire blowout. He pulled to the side of the road and exited the vehicle with his passengers. Shortly thereafter, defendant Jackson hit the same object, causing her to lose control of her car, and sending it spinning into defendant Brazeau's vehicle. Brazeau immediately hit the brakes, his air bag deployed, and his car veered into the

guardrail, striking Castro's vehicle and Castro, causing injuries. Castro sued Brazeau for damages.

Brazeau moved for summary judgment contending that the material facts were not in dispute, and he was not negligent. He presented his deposition, Castro's deposition and the deposition of Castro's passengers. No evidence suggested any negligence on the part of Brazeau other than the passengers' testimony regarding Brazeau's speed. However, neither Castro nor his passengers saw the Brazeau car before the accident. One of the passengers testified that Brazeau must have been traveling very fast because of the damage caused to Castro's vehicle's chassis in the crash. Because there was no expert evidence offered to show that the crash damage would indicate that Brazeau was speeding or that he was negligent, the trial court granted summary judgment.

On appeal, Castro claimed that the passengers testimony created a disputed issue of fact as to Brazeau's speed and, there-fore, his negligence. The 4th DCA held that the conclusion of one passenger that Brazeau had to be speeding based upon the crash damage caused to Castro's vehicle was not competent evidence because the passenger was not qualified as an expert. **Section 90.701(2)**, Florida Statutes, (permitting opinion testimony from lay witnesses only when such opinions do not require specialized knowledge, training or skill).

Recognizing the deficiency of the witness' testimony to provide competent evidence of negligence, the trial judge asked Castro's attorney whether he had an affidavit from an accident reconstruction expert. The attorney responded that he thought the witness testimony was sufficient but asked for a continuance to obtain such evidence. The judge admonished Castro's attorney, telling him that the motion had been set for hearing for months, giving the attorney plenty of time to obtain the necessary proof. The judge refused to continue the case. Because there was no evidence to dispute the facts, the judge granted summary judgment, saying he had no choice under the circumstances.

The 4th DCA recognized that the trial judge had discretion regarding the request for continuance, but affirmed his denial of the request where no good cause was shown why one should be granted.

**CIVIL PROCEDURE - VACATION OF  
JUDGMENT - WHERE PARTY DID NOT RECEIVE COPY OF  
JUDGMENT IN TIME TO APPEAL IT, COURT REQUIRED TO GRANT  
MOTION TO VACATE UNDER RULE 1.540(b) AND ENTER NEW ORDER**

***Broward County v. Eller Drive Limited Partnership***, 29 Fla. L. Weekly D1217 (Fla. 4th DCA May 19, 2004)

The trial court signed a final judgment on May 20, 2003, but neither side received a copy of the judgment until after the appeal time had run. On July

18, 2003, after the county became aware of the entry of the judgment, it filed a verified rule 1.540(b) motion to vacate, which the trial court denied.

F.R.C.P. 1.080(h)(1) requires that conformed copies of all orders must be mailed to all parties. When a party does not receive a copy of an order in time to appeal it, and it was agreed that the county did not in this case, the trial court must grant a motion to vacate under rule 1.540(b) and enter a new order.

**CIVIL PROCEDURE - DISMISSAL WITH  
PREJUDICE - FAILURE TO COMPLY WITH COURT  
ORDER COMPELLING DISCOVERY - ABUSE OF DISCRETION  
WHERE NO SHOWING OF WILLFULNESS AND COURT DID NOT  
CONSIDER WHETHER LESSER SANCTION MIGHT HAVE BEEN SUFFICIENT**

***Bank One, N.A. v. Harrod***, 29 Fla. L. Weekly D1219 (Fla. 4th DCA May 19, 2004)

Bank One filed a mortgage foreclosure complaint against Harrod. On December 21, 2001, Harrod filed and served a request to produce bank documents.

On March 8, 2002, the trial court entered an order compelling Bank One to produce the requested documents within ten days.

One year passed, and then on March 20, 2003, the trial court *sua sponte* issued a "motion, notice and hearing of dismissal." The order directed the parties to show good cause in writing by April 4, 2003 why the case should not be dismissed for lack of prosecution. It set a hearing for April 9, 2003 and provided a failure to make a timely showing of good cause would result in dismissal for lack of prosecution. Harrod responded to the court's *sua sponte* motion and asked the court to dismiss Bank One's case with prejudice because, in addition to there being no record activity for over a year, the Bank had ignored the court's earlier order compelling discovery.

Bank One failed to attend the hearing and failed to file any response until April 14, 2003. According to a later filed affidavit, Bank One did not receive the court's show cause order.

On April 10, 2003, the trial court had entered a final judgment of dismissal with prejudice. Although the judgment noted there had been no activity of record for over a year, the court based the dismissal with prejudice on appellant's failure to comply with the order compelling discovery entered on March 8, 2002. The court summarily found that the failure to comply with the order was "willful and deliberate."

Bank One's counsel moved for a rehearing, supporting its motion with an affidavit of a legal assistant demonstrating that he did not receive notice.

The 4th DCA noted that in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993), the Florida Supreme Court set forth six factors which must be considered by a trial court before dismissing a complaint with prejudice for non-compliance with a court order:

- 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appear to be a viable alternative, the trial court should employ such an alternative.

The 4th DCA held that because there was no indication that the trial court had considered these factors, because it failed to make the "required findings" in its order, reversal had been required. Even though the lack of findings is alone a sufficient ground for reversal, the 4th DCA also considered the six *Kozel* factors and found most of them to be missing.

Moreover, the trial court was required to consider whether, in light of the six factors, a lesser sanction might have been sufficient. Again, the order is deficient in failing to consider this question.

Finally, the 4th DCA observed that dismissal of this case cannot be upheld on the alternative ground of the one year delay in prosecution, since failure to prosecute permits only a dismissal **without** prejudice.

This was reversed and remanded for further proceedings. On remand, the trial court may consider the imposition of other, lesser sanctions.

**AND PLACED CHECK MARK IN BOX INDICATING REJECTION OF  
STACKING FORM OF COVERAGE AND SELECTION OF NON-STACKING  
FORM OF COVERAGE, TRIAL COURT ERRED IN FINDING STACKING  
AVAILABLE BECAUSE OF PATENT AMBIGUITY - INSURER ENTITLED TO  
RELY UPON INSURER'S SIGNATURE ON FORM AS CONCLUSIVE PRESUMPTION  
OF INSURED'S KNOWING AND VOLUNTARY WAIVER OF STACKING UM COVERAGE**

*State Farm Mutual Automobile Insurance Company v. Parrish*, 29 Fla. L. Weekly  
D1222 (Fla. 5th DCA May 21, 2004)

State Farm appealed a final declaratory judgment in favor of Parrish. State Farm claimed the trial court erred in finding that stacked uninsured motorist coverage was available to the Parrishes under their State Farm policy.

The issue is whether the Parrishes knowingly selected non-stacking uninsured motorist insurance coverage, or more specifically, whether State Farm met its burden of proving a non-stacking election.

This case boiled down to the way in which the application form, filled out in 1991, is checked and whether the check mark created an ambiguity. The trial court said it did, the 5th DCA disagreed and reversed.

F.S. § 627.727 (1991) requires that all motor vehicle liability insurance policies that provide bodily injury liability coverage include uninsured motorist coverage. Under F.S. § 627.727(1), the amount of UM coverage is equal to the amount of bodily injury liability purchased by an insured, unless the insured rejects UM coverage or selects lower limits of UM coverage.

An insured may reject such coverage in writing, and if the form is signed by a named insured, it will be conclusively presumed that there was an informed, knowing rejection of coverage or election of lower limits on behalf of all insureds.

The form was admitted into evidence. The trial judge looked at the form and found a patent ambiguity existed because, as he interpreted the form, the insured checked only one box which rejected stacking coverage but did not check another box wherein lower limits of UM coverage were written in hand. In other words, the trial judge thought both boxes should be checked. Since only one was checked, he found a patent ambiguity existed.

On appeal, the 5th DCA found that the trial judge was mistaken based on an incorrect interpretation of the form which caused the trial court to conclude that an ambiguity existed. The appellate court found that the form had been properly filled out and signed by the insured, there was no patent ambiguity on the face of the form, and that State Farm was entitled to rely upon Mr. Parrish's signature on the form as a conclusive presumption of the Parrishes knowing and voluntary waiver of stacking UM coverage.

**Florida Law Weekly**

May 28, 2004

Page 10

JLH:DBM:pas