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## TORTS – MEDICAL MALPRACTICE STATUTE OF LIMITATIONS

***Patrick v. Gaiten,*** 36 Fla. L. Weekly D1046 (Fla. 1st DCA May 18, 2011)

The 1st DCA held that when a claimant obtained a 90-day extension to the statute of limitations and defendant later received notice of termination of negotiations, thereby allowing the limitations period to begin running again, a complaint was untimely if filed more than 60 days later than the date on which the limitations period would have expired.

F.S. § 766.014 allows a party to purchase a 90-day extension on the statute of limitations for medical malpractice claims in order to conduct a reasonable investigation. F.S. § 766.016(3) and F.S. § 766.016(4) provide that a notice of intent to initiate litigation tolls the running of the statute of limitations for 90 days. F.S. § 766.016(4) also provides that upon receipt of termination of negotiations, a claimant has 60

days or the remainder of the period of the statute of limitations, whichever is greater, to file suit.

In this case, the claimant purchased a 90-day extension prior to the expiration of her statute of limitations for a medical malpractice claim. Within this 90-day extension period, the defendant received the plaintiff's notice of intent to initiate litigation.

Thereafter, the claimant received the defendant's notice of termination of negotiations. This caused the statute of limitations to begin running again. At this point, the claimant had 37 days remaining on the statute of limitations once it resumed. Pursuant to the statute, because this was less than 60, the claimant had 60 days in which to file a complaint. However, the claimant filed the complaint 78 days later.

The trial court found that the complaint was untimely and entered summary judgment in favor of the defendant, and the claimant thereafter appealed. The 1st DCA agreed with the trial court and held that the claimant's complaint was untimely.

## PREVAILING PARTY ATTORNEY'S FEES AND COSTS

***Tierra Holdings Ltd. v. Mercantile Bank,*** 36 Fla. L. Weekly D1049 (Fla. 1st DCA May 18, 2011)

The 1st DCA held that because of F.S. § 768.79, a prevailing party is entitled to all attorneys' fees, including fees incurred after rejection of a settlement offer, despite a contractual clause barring such fees.

In 2004, Mercantile Bank and Tierra Holdings entered into a contract which contained a clause stating that the prevailing party in the litigation would be entitled to attorney's fees. In 2007, Mercantile brought a breach of contract action against Tierra.

After Mercantile rejected Tierra's settlement offer, the action proceeded to trial. Judgment was entered in favor of

Mercantile, who then moved for attorney's fees pursuant to the contract. In response, Tierra claimed that Mercantile was barred from any attorney's fees incurred after the settlement offer, arguing that the original contract contained a provision barring entitlement for any fees incurred after such offer.

The 1st DCA considered the issue of whether a proposal for settlement cuts off a party's entitlement to attorney's fees and held in favor of the plaintiff, Mercantile. The 1st DCA rejected Tierra's argument that the contract contained a clause cutting off entitlement to attorney's fees after a settlement offer.

Instead the court relied on the Florida Supreme Court's broad interpretation of F.S. § 768.79, which authorizes the modification of a contract that provides for attorney's fees. The 1st DCA therefore upheld the trial court's full award of attorney's fees to Mercantile as the prevailing party.

**TORTS – AUTO**
**INSURANCE – GRAVES AMENDMENTS – ACTIONS AGAINST INSURERS**

***Daimler Chrysler Ins. Co. v. Arrigo Enterprises, Inc.,*** 36 Fla. L. Weekly D1067 (Fla. 4th DCA May 18, 2011)

The 4th DCA held that the insurer for a lessee owes no legal duty to a claimant for actions of the lessor.

Plaintiff, Daimler Chrysler Ins. Co., was the insurer for DCFS Trust. DCFS was the parent company of lessor, Arrigo Enterprises, Inc., the defendant in this case. Arrigo leased a vehicle to the lessee and assigned the lease to DCFS. Before doing so, DCFS accepted Arrigo's assurance that the vehicle was properly insured.

However, the lessee driver did not have the required full insurance and was involved in an accident which resulted in a death. Despite the fact that the Graves Amendment provides that a lessor cannot be held vicariously liable for the lessee's negligence, Daimler and DCFS assumed the liability of the lessee

and paid $1 million to the victim's family to settle the wrongful death claim.

Daimler than filed an action against not only the lessee, but also Arrigo under the doctrine of equitable subrogation. Daimler contended that Arrigo was effectively taking the place of DCFS. In the complaint, Daimler alleged that Arrigo failed to properly assure that the driver complied by the requirements to maintain full insurance.

The trial court granted Arrigo's motion to dismiss finding that because of the Graves Amendment, Daimler and DCFS were never vicariously liable. The 4th DCA affirmed the trial court's granting of Arrigo's motion to dismiss, but on the ground that Arrigo owed no legal duty to Daimler.

The 4th DCA also noted that Daimler and DCFS still could have pursued an equitable subrogation claim against Arrigo for their payment of the damages. However, because they pursued a negligence claim where there was no duty, they therefore could not recover against Arrigo.

## INSURANCE – ATTORNEY'S FEES – CONTINGENT FEE STRUCTURES – HOURLY RATES

***Western and Southern Life Ins. Co. v. Beebe,*** 36 Fla. L. Weekly D1082 (Fla. 3d DCA May 18, 2011)

The 3d DCA held that in a dispute over the amount of attorney's fees to which a prevailing party is entitled, the court will award the hourly amount as specified in the original retainer contract rather than a calculation of an hourly amount derived from a contingent-fee basis.

Appellee Jessica Beebe retained attorney Lynn Waterman for an action against a life insurer. Ms. Beebe was successful in summary judgment at the trial court level and was entitled to recovery of attorney's fees.

Although the client-attorney contract was on a contingent fee basis, Ms. Beebe sought an award based on a rate of $451 per hour. After several hearings, her hourly rate was set at $350 with a multiplier of 1.5. However, the contingent fee contract specified an hourly rate of $300 per hour.

The trial court entered judgment in favor of the appellee, Ms. Beebe, awarding the equivalent amount of $350 an hour and Western, the life insurance company, subsequently appealed not the entitlement, but the amount.

The 3d DCA reversed the award of attorney's fees on the basis that the attorney-client contract specified an hourly rate of $300 per hour. This was confirmed by the attorney's affidavit in support of fees. The 3d DCA based its decision not on the memorandum of law provided by appellee, but rather on the hourly rate that was provided in the original contract which served to cap the amount of attorney's fees the attorney was entitled to recover.

## CIVIL PROCEDURE – ABUSE OF DISCRETION – GRANTING NEW TRIAL

***State Farm Mutual Auto. Ins. Co. v. Caboverde,*** 36 Fla. L. Weekly D1090 (Fla. 3d DCA May 18, 2011)

The 3d DCA held that a trial court may only disturb a jury verdict by granting a new trial when there is clear deception or undue influence of the jury. Relying on ***Brown v. Estate of A.P. Stuckey*** (2000), the court reinstated the original jury verdict which was overturned by the lower court.

The court further elaborated that it is an abuse of discretion for the trial judge to act as an additional juror or when the trial judge substitutes its own verdict for that of the jury. The 3d DCA therefore reversed the trial court's order and reinstated the original jury verdict in favor of appellant, State Farm.

## INSURANCE – ATTORNEY'S FEES – F.S. § 627.428

***Guarantee Ins. Co. v. Worker's Temporary Staffing, Inc.,*** 36 Fla. L. Weekly D1092 (Fla. 5th DCA May 20, 2011)

The 5th DCA held that when a party voluntarily dismisses an action, it does not constitute a judgment or admission of liability for purposes of pursuing attorney's fees.

Appellant, Guarantee Insurance Company, originally filed an action against Worker's Temporary Staffing for non-payment of insurance premiums. However, appellant failed to attach the necessary documents to its complaint and the lower court granted appellee's motion to dismiss.

The lower court also permitted Guarantee 20 days to file an amended complaint. Instead of filing an amended complaint, Guarantee filed a notice of voluntary dismissal without prejudice. The appellee then filed a motion for attorney's fees and costs under F.S. § 627.428.

F.S. § 627.428 provides that whenever a judgment is rendered against an insurer the opposing party can pursue attorney's fees. In this case, the appellee claimed that Guarantee's voluntary dismissal without prejudice constituted a judgment against it.

The lower court granted the appellee's motion for attorney's fees and entered judgment against Guarantee. On appeal, the appellee continued to argue that the voluntary dismissal was at the very least the functional equivalent of a judgment against Guarantee. Appellee further argued that because Guarantee had not re-filed, their voluntary dismissal amounted to a judgment on the merits.

The 5th DCA agreed with Guarantee that its voluntary dismissal without prejudice did not constitute a judgment. Therefore, appellees were not entitled to attorney's fees under F.S. § 627.428. Furthermore, the 5th DCA was not convinced by the appellee's arguments that Guarantee's failure to re-file after dismissal rendered their voluntary dismissal a judgment.

Therefore, the 5th DCA reversed the lower court's granting of the appellee's motion to tax fees and costs.

JLH/AEE/tog/tsr