FLORIDA CASE LAW UPDATE DECEMBER 2007

BY:
MITCHELL FELDMAN
SILVER, LEVY, FELDMAN & BASS, PA.
TAMPA, WEST PALM BEACH, MIAMI, FORT LAUDERDALE, OCALA/GAINESVILLE

1 **Williams v. Davis, November 2007**, Florida Supreme Court: Liability of private owners of non-commercial or residential property for foliage not extended into the public right of way. The Supreme Court held that a landowner in this situation does NOT owe a duty to manicure or remove foliage on their own property not extending outside the bounds of the property into the public right of way. In this situation, the Court said the "foreseeable zone of risk" analysis does not apply. Unlikely that a residential landowner would foresee that adjacent motorists would be endangered by the mere presence of foliage on the property. Motorists must use reasonable care while driving, commensurate with the road and surroundings. Such a duty includes the duty to enter intersections only upon a determination that it is safe to do so under the prevailing conditions.

McCain forseeability test: must analyze whether landowner's conduct created a "foreseeable zone of risk" posing a general threat of harm toward the patrons of the business as well as those pedestrians and motorists using the streets and sidewalks.

2 **Marsh v. Valyou, JR, November 2007**, Florida Supreme Court: The **FRYE test** does not apply to expert testimony causally liking trauma to fibromyalgia (and even if it did, the expert opinion of a doctor that it is caused from the trauma satisfies the FRYE test). Even more important, the concurring judges wrote that the FEDERAL rules of evidence have since overruled or superceded FRYE and its standard pursuant to the *Daubert vv. Merrell Dow Pharrms* case, 509 US 579 (1993).

A Frye test: proponent of the evidence bears burden of establishing by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology. So by definition this test only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques, not their training and experience.

The key impact is that the concurring opinion by Judge Anstead, who says its absurd that Florida follows a federal case itself superseded by both the Federal Rules of Evidence and the Daubert decision, and yet Florida seems to still use it while Florida's evidence code is modeled after the same federal rule. He calls in doubt whether Frye has survived Florida's adoption of the same evidence code as the feds use. Other lower court decisions have also rejected Frye. He would certify to the Court the question of whether the Frye test survived the new evidence code.

3 **Willis v. Gami Golden Glades, LLC, October 2007**, Florida Supreme Court: Discusses the "**impact rule**" in tort cases. The Court opens the floodgates to psychological/psychiatric claims, holding that a Plaintiff only has to prove some impact or some contact by the tortfeasor to have the right to recover damages for psychiatric/psychological/emotional injury. No longer does a plaintiff/person have to prove under the "impact rule" that he or she sustained physical injury related to the accident.

Plaintiff went to Holiday Inn late at night. Parking lot full. Security guard for hotel told Mrs. Willis to park across the street. Dark and she expressed concerns. Guard says its safe and he will not help her in anyway. After she parks and opens door, she is attacked and car jacked. The assailant puts the gun to the side of her head and allegedly pulls trigger with a clicking sound, then has her lift up her clothes and touches her briefly and pats her down. She goes to ER not until next day and claims post traumatic stress disorder and related depression, anxiety, fears, and deterioration of relationship with husband.

Strong dissent and concurring opinions. One side says the decision is outrageous and the Pandora box argument, and concurring opinion is that it's just the same as always.

To recover for emotional distress plaintiff must show a physical impact from an external force. However, if the plaintiff has not suffered in impact, the complained of mental distress must be manifested by physical injury, either the plaintiff must be involved in the incident by seeing, hearing or arriving on the scene as the traumatizing event occurs, and the plaintiff must suffer the complained of mental distress and accompanying physical impairment within a short time of the incident. Must be a relative you see injured or killed.

Concurring: IT is the mere existence of a physical impact or contact that is the criterion by which actions are deemed viable, not the relative force of the impact or contact, not the size of the bruise or the scrape that may result from the contact. I would abolish the impact rule as applied in Florida and adopt the traditional forseeability analysis.

DISSENT: The rule opens the door for false claims and causes of action based upon contrived statements about touching rather than upon demonstrable physical injuries as our **cases before today** have required. Good reasons for the rule requiring an impact AND a physical injury is to ensure the authenticity of the claims for emotional distress. Argues that the majority actually concedes that physical injury is still the majority rule. Now, the majority's holding is that as long as there is impact, we do not require a physical injury to recover for emotional injury.

4 **Luscomb v. Liberty Mutual Insurance Company, (and BJ's), October 2007: Holding**: The Employer/Carrier lien under 440 against the third party case by the employee against the tortfeasor is capped at the net recovery of the employee. The E/C has the right to a lien after its pro-rata share of fees are also taken off of the net settlement.

The pro-rata share = total fees and costs/gross settlement or judgment. Thereafter, the E/C's lien is based upon the following formula:

E/C's lien amount - prorata share of fees and costs, x % of net settlement or judgment/actual value of case (after fees and costs taken out).

No right to lien on any UM benefits and the UM benefits cannot be used in the analysis as to the employees recovery.

5 **Palm Beach Polo Holdings v. Madsen, Sapp, Mena, Rodriquez and Co., 957 So.2d 36 (Fla 4th DCA 2007)**. The fact that the proposal for settlement did not specifically state that upon acceptance of offer the claims are dismissed. Court affirms award of fees and costs stating that the proposal is not ambiguous; that the offer is clearly intended to end the case and is a settlement offer; and that if accepted it ends he litigation and disposes of claims.

6 **Jefferson v. City of Lakeland, 1st DCA 2007**. Typographical error on statute does not invalidate proposal for settlement. However, in Campbell v. Goldman, Florida Supreme Court held that the failure to cite any statute invalidated the proposal for settlement. Must state being made under 768.79 as per FRCP 1.442., and the dissent here said it should be reversed and struck.

7 **Saenz v. Campos and State Farm, 4th DCA 2007**. The appellate court affirms motion to strike plaintiff's proposal for settlement. One section said the proposals resolved all claims in the suit only and another said it would resolve all claims the plaintiffs had. Unclear whether it included bad faith claim that had been noticed under civil remedies statute. At time it was offered is when to look at it, and at that time, the bad faith claim was not resolved. Court said the ambiguity is patent and reviews such matters de novo.

8 **Maryland Casualty Co v. Alicia Diagnostic Inc., 961 So.2d 1091 (Fla 5th DCA 2007)**. Florida law: party cannot file suit against insurer for bad faith until an underlying coverage dispute is resolved.

9 **Nationwide v. Maida Solano Voigt, 2nd DCA October 2007**. Jury awards $465,650. Policy limit was $50,000 for UM. If no dispute exists as to policy limits or coverage and known to all parties during discovery, trial court must upon verification, grant insurer's motion to limit the judgment to the policy limits. No harm if done post trial. Most importantly, Nationwide's motion for fees under 57.105 was approved by the appellate court. The attorney knew or should have known that the proposed final judgment was not supported by existing law, and pursuing the judgment in the appeal was without merit. Further the Court awards appellate fees under 57.105 and remands to determine amount. The fees must be paid 50% by the lawyer and 50% by the plaintiff.

10 **Gehrmann v. City of Orlando, 962 So.2d 1059 (Fla 5th DCA 2007)**. Trial court dismissed case for fraud upon motion by City. Plaintiff in deposition said NO to a question about any back problems prior to the accident. Said he never hurt his back playing sports. He later told the IME that he had occasional back pain, and the doctor said the MRI showed pre-existing conditions. The plaintiff said to the IME doctor he had

seen a chiropractor 5 years earlier, but those records could not be found. He had 3 chiropractic treatments in 1993 for $300 and one orthopedic evaluation in 1995 for $76.00. Plaintiff said he did not recall any doctors he ever saw and he had no prior injuries. He further denied any prior work related accidents. The accidents were work comp claims.

The Court found that since no witnesses came to the hearing. The defense did not prove the requisite intent to defraud. Bring it to the jury instead the court said. In other words, you need more evidence of the incidents and the extent of the injuries.