THE WEEK IN TORTS

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CASES FROM THE WEEK OF APRIL 18, 2014

FLORIDA CIVIL RIGHTS ACT PROHIBITS PREGNANCY DISCRIMINATION IN EMPLOYMENT

Delva v. The Continental Group, Inc., 39 Fla. L. Weekly S246 (Fla. April 17, 2014):

Florida law prohibits pregnancy discrimination in employment practices. The term "sex" as used in the FCRA, includes discrimination based on pregnancy.

ERROR TO AWARD INJURED SEAMAN ATTORNEY'S FEES PURSUANT TO OFFER OF JUDGMENT STATUTE IN ACTION AGAINST CRUISE LINE FOR JONES ACT NEGLIGENCE--COURT RECEDES FROM PRIOR PRECEDENT

Royal Caribbean Cruises v. Cox, 39 Fla. L. Weekly D740 (Fla. 3rd DCA April 9, 2014):

Sitting *en banc*, the Third District held that federal substantive maritime law governs seamen cases brought in state court, and because federal maritime law follows the American rule regarding attorney's fees, state law regarding the offer of judgment statute does not apply.

A review of the pertinent case law reveals that in addition to Florida's federal court decisions holding §768.79 may not be applied in maritime cases, other federal courts have considered whether state fee shifting statutes may supplement federal maritime law. These cases have also consistently concluded that application of state fee shifting statutes conflicts with maritime law, thereby violating the important maritime principle of uniformity.

Thus, the court held Florida's offer of judgment statute does not apply.

TRIAL COURT ERRED IN DENYING MOTION TO COMPEL ARBITRATION IN NURSING HOME CASE ON THE GROUND THAT FEES WERE TO BE BORNE EQUALLY BY PARTIES AND FINDING THAT ARBITRATION WOULD BE PROHIBITIVELY EXPENSIVE FOR THE PLAINTIFF'S ESTATE

Fi-Tampa v. Kelly-Hall, 39 Fla. L. Weekly D748 (Fla. 2nd DCA April 11, 2014):

In opposition to the motion to compel arbitration, the estate submitted a sworn affidavit averring that it had no assets and could not afford to pay any arbitration fees whatsoever. It submitted a copy of AAA's healthcare policy statement indicating that it would no longer accept administration of cases involving individual patients, without a post-dispute agreement to arbitrate. The estate also submitted copies of JAMS procedures, which require the payment of fees, **prior** to the arbitration (or risk suspension or termination). If a party does not pay fees and the expenses prior to the hearing, the party could be prohibited from offering evidence of an affirmative claim.

Although the estate presented the argument in terms of a public policy violation, the underlying premise was that in this instance, arbitration would be prohibitively expensive. The estate contended that the terms of the agreement were impossible to perform, because AAA would no longer accept administration of cases involving individual patients without a post-dispute agreement to arbitrate.

The court also refused to consider the impossibility of performance defense. There was no showing that it was "impossible" to arbitrate the estate's claim because of the healthcare policy statement.

ARBITRATION AGREEMENT BETWEEN DOCTOR AND PATIENT WHICH PROVIDED FOR PARTIES TO SHARE ARBITRATION EXPENSES EQUALLY, DID NOT PROVIDE A BASIS TO FIND THAT THE AGREEMENT WAS CONTRARY TO PUBLIC POLICY, OR UNCONSCIONABLE--PLAINTIFFS NEVER REQUESTED VOLUNTARY STATUTORY BINDING ARBITRATION--TRIAL COURT DID NOT ERR IN GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION PURSUANT TO PRIVATE ARBITRATION AGREEMENT

Santiago v. Baker, 39 Fla. L. Weekly D750 (Fla. 2nd DCA April 11, 2014):

The parents in this case sued a doctor and her practice for the severe birth defects that their child was born with. The parents alleged that the birth resulted from a drug that the mother was given to treat a chronic disease.

According to the complaint, upon becoming a new patient of the practice, the plaintiff informed the medical staff that she and her husband were planning to have a second child. Later, an over-the-counter pregnancy test taken by the mother yielded a positive result. On two visits, several days later, the practice advised her that the pregnancy was not viable, and recommended a dilation and curettage. The mother declined the procedure.

However, believing that spontaneous passage of the fetus would occur, the mother resumed taking the drug. She alleged that she was unaware of the possible adverse effects the drug might have on the fetus anyway. The baby was then born seriously impaired.

When the mother became a patient of this practice, she had signed an arbitration agreement which covered the claims asserted in the complaint. She executed the agreement **prior** to the baby's birth and **prior** to the baby's conception.

After the complaint was filed, the practice successfully moved to compel arbitration. The parents challenged the trial court's ruling.

The parents argued that the arbitration agreement violated Florida's public policy as reflected in the medical malpractice statutes. They claimed that the Act required the resolution of malpractice claims exclusively through statutory voluntary binding arbitration, or through trial. The defendant, however, contended that the Act is much less broad.

The parents never requested voluntary statutory arbitration and thus never invoked the protections of §766.207. Instead, they willingly signed the defendant's arbitration agreement without coercion or duress. Nothing in the agreement was substantively or procedurally unconscionable. The agreement clearly specified that the parties were waiving their right to a jury trial and consented to arbitrate all claims arising out of or related to medical care and treatment. The parties agreed to share arbitration expenses equally.

The parents insisted that if neither party sought arbitration under §766.207, then the law would bar the arbitration of a malpractice claim. They contend that the arbitration agreement they signed lessened their rights under the Act, and was inconsistent with the Medical Malpractice Act's purpose and public policy. They argued that *Franks v. Bowers* supported their argument. However, *Franks* applied to an arbitration that was done under the Act, but did not conform to the statute. Here, the parties never invoked the statutory arbitration scheme.

Franks though, did not hold that all private arbitration agreements are void against public policy. Thus, nothing in that case impeded the general enforceability of agreements to arbitrate. Because nothing in the agreement was void as against public policy, the court upheld it.