What Is My Assumption of Risk?

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McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation.

Ohio

Assumption of the Risk

***Smith v. Be Fit with Michelle, LLC*, 11th Dist. Lake, No. 2023-Ohio-3118.**

In this appeal, the Eleventh Appellate District affirmed the trial court's decision to grant the defendant summary judgment on a negligence claim, finding that the plaintiff expressly waived his right to recover for any negligence against the defendant.

The Bullet Point: "Express assumption of risk * * * arise[s] where a person expressly contracts with another not to sue for any future injuries which may be caused by that person's negligence." Express assumption of the risk is the same as waiving the right to recover. "For express assumption of risk to operate as a bar to recovery, the party waiving his right to recover must make a conscious choice to accept the consequences of the other party's negligence."

Proof of Amount Owed on Loan

***Castle CFD Group, LLC v. Kenney*, 6th Dist. Lucas, No. 2023-Ohio-2980.**

In this appeal, the Sixth Appellate District affirmed the trial court's decision granting summary judgment to the plaintiff on its claim to foreclose on a land contract, finding it adequately proved the defendant's default and amount due, and the defendant failed to prove the affirmative defense of payment.

The Bullet Point: "In a foreclosure case, the amount due and owing on a note can be proven by a simple averment of the amount owed from a bank employee with personal knowledge of the debtor's account unless the debtor refutes the alleged amount with evidence that he owes a different amount." In other words, "[a]n affidavit stating the loan is in default, is sufficient for purposes of Civ.R. 56, in the absence of evidence controverting those averments." Once evidence of an obligation is established, the burden is upon the defendant to prove any payments." "[P]ayment is an affirmative defense to an action on a debt, and is

consistent with the general principle that the burden of proof should be upon that party who is in the best position to come forward with evidence."

Florida

Business Judgment Rule

***Francois v. JFK Medical Center LP*, No. 4D22-1627 (Fla. 4th DCA August 30, 2023)**

The Fourth District concluded that the business judgment rule applies in workers' compensation retaliation.

The Bullet Point: To prevail on a workers' compensation retaliation claim, an employee must prove a pretext by showing both that the employer's proffered reason for disciplining the employee was false and that retaliation was the real reason. In this appeal, an employee argued that the trial court erred by relying on the business judgment rule in granting summary judgment in favor of the employer on his retaliation claim. The Fourth District disagreed, concluding that the business judgment rule applies to retaliation claims. As a result, the court could not examine the employer's logic in terminating the employee because its inquiry was limited to whether the employer, in good faith, believed that the employee had engaged in the conduct that led to his termination. Because the employee failed to show any evidence that the employer's decision-makers did not honestly believe its proffered reason for terminating him, the trial court properly granted summary judgment in favor of the employer.

Extension of Notice of Lis Pendens

***Zakharova v. Innovative Technologies & Consulting Limited Corp., at al.*, No. 3D23-1180 (Fla. 3d DCA August 30, 2023)**

The Third District determined that a motion to extend a notice of lis pendens need not be filed within one year of commencement to justify relief.

The Bullet Point: Pursuant to section 48.28, Florida Statutes, a notice of lis pendens automatically expires at the one-year mark following the commencement of the action. However, the court can extend the time of expiration on reasonable notice and for good cause. In this appeal, the Third District concluded that the trial court erroneously assumed it lacked authority to extend an already expired lis pendens. This is because a motion to extend a notice of lis pendens need not be filed within one year of commencement to justify relief. Instead, the court must examine whether the movant has provided reasonable notice and established good cause regardless of when the motion to extend was filed. Accordingly, because the denial of the petitioner's motion to extend the notice of lis pendens poses a risk of irreparable harm, the order denying the extension was quashed.

Public Adjuster Fees

***Monarch Claims Consultants, Inc. v. Fleming*, No. 1D22-601 (Fla. 1st DCA September 6, 2023)**

The First District examined whether an agreement was void for violating Florida law governing a public adjuster's recovery of fees.

The Bullet Point: Section 626.854, Florida Statutes, sets express limitations on a public adjuster's recovery of fees. Specifically, a public adjuster may not recover more than 20 percent of the amount of the insurance claim payment or settlement. Where the insurance claim is based on events that are the subject of a declared state of emergency, the public adjuster's recovery is limited to a fee of ten percent of the insurance claim payment.

In this case, the subject agreement entitled the public adjuster to (1) ten percent of the insurance recovery; and (2) a promise that the insureds would appoint the public adjuster as their appraiser in the event of an appraisal, entitling the public adjuster to an additional ten percent of the recovery. The trial court determined that this provision of the agreement violated section 626.854 because the public adjuster's recovery exceeded the maximum amount recoverable on claims flowing from a declared state of emergency. On appeal, the public adjuster argued that the limitations of the statute apply only to public adjuster fees, not appraiser fees. The First District disagreed, reasoning that even if the added ten percent fee counts as an "appraiser fee" instead of a "public adjuster fee," the contract would still violate the statute. This is because the insureds' promise to appoint the public adjuster as their appraiser is a "thing of value" exceeding the ten percent recovery cap. Accordingly, the agreement was void for violating Florida law.

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