CIVIL PROCEDURE

Civil Procedure: Assignment of Legal Malpractice Claims

Cowan, Leibowitz & Latman, P.C. v. Kaplan,
902 So. 2d 755 (Fla. 2005)

The broad prohibition against the assignment of legal malpractice claims may not be justified on public policy grounds when the attorney involved is found to owe a legal duty to persons other than his or her client.

FACTS AND PROCEDURAL HISTORY

Medical Research Industries, Inc., a Florida corporation, retained the petitioner attorneys (Petitioners) for the purposes of writing private placement memoranda and making unsecured loans to the controlling director. The loans to the director, financed by investor funds raised from the private placements, led to the company's insolvency. The corporation sued the director to recover the loan funds but was unsuccessful, and thereafter, executed an "Assignment for the Benefit of Creditors" to Kaplan (Assignee). The Assignee then filed a malpractice suit against the petitioners, alleging that they knew or should have known that information contained in the private placement memoranda was false and misleading because the memoranda failed to disclose that the money to be raised was not used for business expansion but, rather, for the unsecured loans to the controlling director. The Assignee alleged that the Petitioners knew this information because they were retained for the partial purpose of writing and approving the unsecured loans. The trial court granted the Petitioners' motion to dismiss, reasoning that the Assignee lacked standing to bring the suit because Florida law held that legal malpractice claims were personal and not assignable, and because they are exempt from levy and sale under an execution of assignment.

The Third District Court of Appeal reversed the trial court's decision, holding that the legal services in the dispute were not personal in nature and that the Assignee was analogous to a bankruptcy trustee with full standing to pursue a debtor's malpractice claim. The Florida Supreme Court approved and re-

manded the Third District's decision. The Court relied upon public policy in permitting the malpractice claim, holding that the duty of lawyers in similar situations extends beyond the client because the lawyer knows that his or her work is intended to be communicated to and relied upon by other people, especially investors.

ANALYSIS

Florida has generally prohibited the assignment of legal malpractice claims. *KPMG Peat Marwick v. Natl. Union Fire Ins. Co.*, 765 So. 2d 36 (Fla. 2000) (implying a blanket prohibition, though in dicta); *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557 (Fla. 1997) (permitting an assignment claim against an insurance agent while contrasting the attorney-client relationship). Public policy disfavors the assignability of legal malpractice claims because the possibility exists that a market may be created in which an attorney is held liable to persons to whom he or she has never owed a legal duty. *KPMG*, 765 So. 2d at 36; *Forgione*, 701 So. 2d at 557. But, when the duties owed to the client are not personal in nature, lawyers have been held to have public duties beyond those owed to the client. *Secs. & Exch. Commn. v. Spectrum, Ltd.*, 489 F.2d 535, 541–542 (2d Cir. 1973); *Kline v. First W. Govt. Sec., Inc.*, 24 F.3d 480, 485–486 (3d Cir. 1994) (holding attorneys liable to investors for misrepresentations and omissions in documents disseminated to investors through the corporate client).

The Florida Supreme Court reasoned that the public policy supporting the prohibition on the assignment of malpractice claims was not applicable to the facts of the present case, although the Court strongly reiterated that policy concerns prohibited most types of these claims. The Court stated that the attorneys' duty stretched beyond the client because the documents they prepared were intended for release to third parties and were, in fact, released to third parties. Thus, the Court distinguished between those legal services that are strictly personal in nature and those that involve the publication of information available to persons other than the client—the Court held that the attorneys owed a duty to the public in advising the corporation and preparing the private placement memoranda.

SIGNIFICANCE

This case loosens the broad prohibition on the assignment of legal malpractice claims. Practitioners, particularly those engaged in corporate law practice, should be aware that documents prepared for dissemination to the public may expose attorneys to an additional level of liability extending beyond their client.

RESEARCH REFERENCE

- Francis M. Dougherty, *Assignability of Claim for Legal Malpractice*, 40 A.L.R.4th 684 (1985).

Jay Daigneault

Civil Procedure: Attorney's Fees

Event Services, Inc. v. Ragusa,
917 So. 2d 882 (Fla. 3d Dist. App. 2006)

If a trial court determines that a defendant did not make a settlement offer in good faith, thereby violating the statutory duty, it is not an abuse of discretion for the trial court to disallow an award of reasonable costs and attorney's fees to a defendant otherwise statutorily entitled to recover. A settlement offer of nominal value is not made in good faith when the plaintiff's complaint is meritorious and the defendant has a reasonable basis to believe that it has palpable exposure to liability.

FACTS AND PROCEDURAL HISTORY

While leaving a football game at Pro Player Stadium, the plaintiffs, Ragusa and seven other individuals, sustained injuries when an escalator on which they were riding unexpectedly accelerated, causing passengers to pile up at the end of the escalator. The injured parties brought a negligence suit against the owner of the stadium; Schindler Elevator Corp., the escalator maintenance company; and Event Services, Inc., the company that provided staffing and services for events at the stadium. Before trial, Event Services made nominal settlement offers of $500 to each injured individual. None of the offers were accepted.

In a bifurcated trial on liability, a jury found that Event Services had not acted negligently. Subsequently, Event Services

moved for attorney's fees, as permitted by Florida Statutes Section 768.79 and Florida Rule of Civil Procedure 1.442(h)(1). Event Services contended that it was statutorily entitled to attorney's fees because it made a settlement offer before the case was submitted to a jury, and the jury's verdict declared that Event Services was not negligent. The trial court, however, denied relief because Event Services' settlement offers violated the statutory duty of good faith. On appeal, the Third District Court of Appeal affirmed, finding no abuse of discretion.

ANALYSIS

The sole issue on appeal was whether the trial court abused its discretion when it found that Event Services' nominal settlement offers were not in good faith and thus denied recovery of costs and fees. Florida Statutes Section 768.79(1) expressly authorizes an award of reasonable costs and attorney's fees to a defendant, "if the plaintiff does not accept an offer of judgment made by the defendant within thirty days, and if the judgment later obtained by the plaintiff is for no more liability or at least twenty-five percent less than the original offer." *Event Servs.*, 917 So. 2d at 884. The statute further provides, however, that the award is discretionary and may be denied if the trial court determines that the offer was made in bad faith.

The Third District provided the test for the good faith requirement, "that the offeror have some reasonable foundation on which to base an offer." *Id.* (citing *Schmidt v. Fortner*, 629 So. 2d 1036, 1039 (Fla. 4th Dist. App. 1993)). Accordingly, the Third District found that the trial court did not abuse its discretion, because Event Services' settlement offer was for a nominal amount when the company's potential liability likely exceeded a nominal amount. The Third District held that a nominal offer is reasonable only when the undisputed record clearly shows that the defendant had no exposure. Further, if a nominal offer is made, undisputed facts must strongly suggest that the offeror had no liability arising from the alleged tortious behavior.

The Third District found no abuse of discretion because the injured individuals stated meritorious claims, and a reasonable basis existed for Event Services to conclude that its liability exceeded the amount it offered to induce settlement before trial. The court noted that Event Services made nominal settlement offers

when disputed facts strongly suggested that Event Services would be held liable for the alleged injuries. According to the record, eyewitnesses declared that more people had been permitted to ride the escalator at one time than was suggested by the manufacturer's limit, and it was indisputable that Event Services failed to disable the escalator in a timely manner following the accident. Based upon these facts, the Third District determined that the trial court properly found Events Services' settlement offers were made in bad faith.

Additionally, the Third District noted that trial courts are not statutorily required to provide specific findings to justify denying an award, because such decisions are clearly discretionary. The Third District held that the trial court did not abuse its discretion when it denied Event Services costs and fees to which it would otherwise have been entitled under Florida Statute Section 768.79 and Florida Rule of Civil Procedure 1.442(h)(1), after the trial court reasonably concluded that the nominal settlement proposals lacked good faith.

SIGNIFICANCE

Event Services warns practitioners that unjustifiably low settlement offers can result in a denial of costs and fees to which the parties would otherwise be statutorily entitled. A defendant violates the statutory good faith requirement for settlement when the party suggests a settlement amount that does not reasonably correspond to its potential liability. Significantly, the rule of good faith can be violated by *any* offer that does not have a reasonable foundation, which could include an unjustifiably low settlement offer that *exceeds* a nominal amount. Because *Event Services* states that a nominal settlement offer is justified only when undisputed facts that strongly indicate that the offeror has no liability are present, this dispels any notion that the presence of disputed facts may serve as a reasonable basis for making nominal settlement offers without risking a subsequent denial of costs and fees. Moreover, because it is within the trial court's sole discretion to award a party costs and fees pursuant to Florida Statutes Section 768.79(7)(a) and Florida Rule of Civil Procedure 1.442(h)(1), on appeal, a party must clearly show the trial court abused its discretion to recover costs.

RESEARCH REFERENCES

- 12 Fla. Jur. 2d *Costs* § 22 (West 2005).
- Laura T. Kidwell, *Disallowance of Award under State Offer of Judgment Rule Due to Lack of Good Faith*, 121 A.L.R.5th 325 (2005).

Philip McCormick

Civil Procedure: Discovery

Tampa Medical Associates, Inc. v. Estate of Torres,
903 So. 2d 259 (Fla. 2d Dist. App. 2005)

Nursing home injury reports may be discoverable by a plaintiff if the nursing home employee who prepared the reports was not a quality-of-care monitor and the plaintiff provided specific evidence or testimony to show need and inability to obtain equivalent information without undue hardship.

FACTS AND PROCEDURAL HISTORY

In a civil action against a nursing home owned by Tampa Medical Associates, Inc., doing business as Mariner Health of Tampa (Mariner), the co-personal representatives of the decedent's estate sought production of "all reports of accidents/falls of any resident, visitor or employee for the years 2000–2001 at [Mariner]." *Tampa Med. Assocs., Inc.*, 903 So. 2d at 260. The trial court held an unrecorded telephone conference in which the court reported its conclusions based on the in camera inspection. Accordingly, the trial court ordered the production of certain incident reports, finding that the estate had made a specific showing of need and inability to gather equivalent information without undue hardship. Mariner filed a petition for writ of certiorari with the Second District Court of Appeal, claiming that the Florida Statutes protect incident reports from discovery. The court granted certiorari and held that the reports were discoverable, remanding the case to the trial court to determine whether the estate had made a specific showing of need and undue hardship.

ANALYSIS

The Second District set forth a two-part test to determine whether nursing home incident reports are discoverable: (1) whether the reports were generated through certain procedures; (2) whether the plaintiff could show a specific need for the information and that the information would not be available from other sources without undue hardship.

Report Procedures

The Second District analyzed Florida Statutes Sections 400.147, 400.118(2)(c), and 400.119(1), which outline the statutory protections given to nursing home reports. Section 400.147(4) requires nursing homes to set up internal risk management programs to ensure quality and include incident reporting systems. Section 400.118 requires nursing homes to set up quality-of-care monitors who oversee the safety conditions of nursing homes and who function as state inspectors. Pursuant to Section 400.118(2)(c), reports generated by quality-of-care monitors in the scope of their duties are not discoverable. However, nursing home employees' reports that are reviewed by quality-of-care monitors are discoverable. Section 400.147 provides that incident reports are discoverable because they are "otherwise available from original sources," that is, the nursing home itself. *Tampa Med. Assocs., Inc.*, 903 So. 2d at 262. When read together, however, Sections 400.118 and 400.147 provide an exception for reports concerning a threat to a resident's health or safety.

Section 400.119(1) provides for the confidentiality of records from internal risk-management meetings. The Second District explained, however, that confidentiality of risk-management reports only affects the public's right of access, but does not preclude the discoverability of incident reports. The court noted that when the statutory protection and/or precise nature of incident reports are in dispute, the proper procedure is for the trial court to conduct an in camera review to determine whether the requested reports are discoverable. Accordingly, the court affirmed the trial court's decision, finding that because the trial court had conducted an in camera review, it had met the first prong barring admissibility.

Specific Need and Unavailability

The Second District agreed that incident reports are discoverable pursuant to Section 400.119(1), but the court explained that the reports are attorney work product. Florida Statutes Section 400.174(4) provides that attorney work product is not discoverable unless the plaintiff specifically shows a need for the information and an inability to gather the information without undue hardship. The court found that although the trial court had determined that the plaintiff had shown need and undue hardship, the record was devoid of any evidentiary basis for that finding. Therefore, the Second District remanded the issue to the trial court with instructions to determine whether the plaintiff could show need and undue hardship.

SIGNIFICANCE

At first glance, it may seem that nursing home incident reports are not discoverable under the Florida Statutes; however, in certain situations, incident reports are discoverable. For nursing home incident reports to be admissible, practitioners must meet a two-prong test. If incidents reports are prepared by nursing home employees for review by quality-of-care monitors, and if plaintiffs can specifically show a need for the information along with unavailability of the information without undue hardship, the reports will be discoverable. Practitioners must provide specific evidence and/or testimony, not merely argument of counsel, to prove unavailability of a substantial equivalent or undue hardship for admissibility to be upheld on review.

RESEARCH REFERENCES

- 19A Fla. Jur. 2d *Discovery and Depositions* § 43 (2005).
- 36 Fla. Jur. 2d *Medical Malpractice* § 5 (2005).

Sandy Phillips

Civil Procedure: Sanctions

Boca Burger, Inc. v. Forum,
912 So. 2d 561 (Fla. 2005)

The Florida Supreme Court held that (1) under the Florida Rules of Civil Procedure, plaintiffs have the right to amend a complaint once, without leave of the court, so long as a responsive pleading has not been served; (2) federal preemption is an issue of subject matter jurisdiction that may be raised in a motion to dismiss; and (3) in appropriate circumstances, an appellee or the appellee's counsel may be subject to sanctions for defending a patently erroneous trial court order.

FACTS AND PROCEDURAL HISTORY

Richard Forum filed a complaint against Boca Burger, Inc., seeking damages under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) as well as declaratory and injunctive relief. Boca Burger moved to dismiss, arguing that Forum failed to state a cause of action. Boca Burger further argued that Florida's Food Safety Act, or in the alternative, the Federal Food, Drug and Cosmetic Act, preempted Forum's claim. On the morning of the scheduled hearing on the motion to dismiss, Forum filed an amended complaint without leave of court. The amended complaint, filed through new (but not substitute) counsel, sought damages for intentional and negligent omissions and misrepresentations. The amended complaint included the names of three sets of lawyers who were not included in the original complaint.

At the hearing on Boca Burger's motion to dismiss, the trial judge expressed concern over two issues and invited defense counsel to respond to those concerns. First, the trial judge noted that a lawyer other than the one who signed the complaint represented Forum at the hearing. When asked to comment on the issue, defense counsel implied that the appearance of new lawyers at this time was improper. Defense counsel failed, however, to acknowledge that the rules specifically permit the appearance of additional lawyers without leave of the court. Second, the trial judge expressed disapproval with the amended complaint filed without leave of court. Forum's counsel argued that a party is free to amend a complaint without leave of the court before a respon-

sive pleading is filed. Because a motion to dismiss is not a responsive pleading, Forum's counsel reasoned that Forum could amend his complaint, even on the day of the hearing. In response, defense counsel cited three cases, a federal case from Michigan, a bankruptcy case, and a case from the Fourth District Court of Appeal. He argued that these cases suggest that amending a complaint while a motion to dismiss is pending improperly prejudices the opposing party. Further, he contended that "it is within the court's discretion to deny leave to amend." *Boca Burger*, 912 So. 2d at 565.

The trial judge disregarded the amended complaint and proceeded with the hearing for the motion to dismiss the original complaint. Moreover, the judge refused to recognize the amended complaint "as filed." The trial court held that the claims in Forum's original complaint were preempted by Florida and federal law. Accordingly, the trial court dismissed the complaint with prejudice, thereby precluding future amendments.

On appeal, the Fourth District reversed, finding that Boca Burger's preemption argument should not have been raised in a motion to dismiss. The court explained that preemption should be pled as an affirmative defense and thus should be resolved in a motion for summary judgment. The court also reversed the trial court's decision to dismiss the complaint with prejudice, holding that Forum could file an amended complaint as a matter of right and that the amended complaint replaced the original complaint. The Fourth District blamed Boca Burger's counsel for arguing that the trial court had the discretion to deny Forum's amended complaint. The court concluded that Boca Burger's misleading argument could not have been made in good faith. Accordingly, the court imposed sanctions against Boca Burger's counsel for advancing this argument at trial and on appeal. Boca Burger appealed to the Supreme Court.

ANALYSIS

Right to Amend a Complaint

The Florida Supreme Court first resolved the question of whether a trial court has the discretion to deny a plaintiff the right to amend a complaint before a responsive pleading is served. The Fourth District had previously held that it is "incontrovertible" that a plaintiff retains the right to amend a complaint once

without leave of court, so long as a responsive pleading has not already been served. *Forum v. Boca Burger, Inc.*, 788 So. 2d 1055, 1059 (Fla. 4th Dist. App. 2001). The Second District Court of Appeal, however, suggested in dicta that the trial court retains "residual discretion" to deny the right to amend a complaint, but only if the plaintiff is clearly unable to state a cause of action. *Volpicella v. Volpicella*, 136 So. 2d 231, 232 (Fla. 2d Dist. App. 1962).

The Court resolved the *Boca Burger* conflict by strictly interpreting the Florida Rules of Civil Procedure. Rule 1.190(a) provides in pertinent part,

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party.

The Court interpreted this rule in the disjunctive, meaning that a plaintiff can amend a complaint either "as a matter of course" (as provided in the first sentence of the rule) or "by leave of court" (as provided in the second sentence). *Boca Burger*, 912 So. 2d at 567. Further, the Court reasoned that these provisions do not overlap and are dependent on the circumstances. Therefore, if a plaintiff can amend a complaint as a matter of right, the trial court has no discretion to deny that right. Because Boca Burger had only filed a motion to dismiss, which is not a responsive pleading, the Court held that Forum had an absolute right to amend the original complaint without leave of court.

Preemption

Next, the Florida Supreme Court addressed the issue of whether a party may assert the defense of federal preemption in a motion to dismiss. The Court reversed the Fourth District, holding that because federal preemption is an issue of subject matter jurisdiction, it may be properly raised in a motion to dismiss. Further, the Court noted that if a party raises the defense of federal preemption in a motion to dismiss, the trial court must decide the issue as a matter of law based on the allegations contained in the pleadings.

Sanctions

Finally, the Florida Supreme Court addressed the issue of whether the Fourth District could impose sanctions on Boca Burger's counsel for its conduct at trial and on appeal. The Court held that the appellate court lacked authority to impose sanctions for counsel's conduct at the trial level because only the trial court can properly impose sanctions against counsel there. The Court explained that the proper procedure at the appellate level is to remand for the trial court to determine whether sanctions should be imposed. Concerning conduct at the appellate level, the Court held that although sanctions could be imposed, the record primarily addressed counsel's conduct at the trial level and did not identify which conduct at the appellate level warranted sanctions. Accordingly, the Court remanded to the appellate court to clearly differentiate which conduct at the appellate level warranted sanctions.

Boca Burger cited *State Department of Highway Safety & Motor Vehicles v. Salter*, 710 So. 2d 1039 (Fla. 2d Dist. App. 1998), for the proposition that defense of a trial court's order should not subject an attorney to sanctions because such an order carries a presumption of correctness on appeal. However, the Court pointed out that *Salter*, and similar cases, predate the 1999 amendment to Florida Statutes Section 57.105. As amended, the statute provides for sanctions if a party "knew or should have known" that an asserted claim or defense was not supported by the material facts or application of then-existing law. Fla. Stat. § 57.105 (2000). The previous version of the statute allowed for sanctions if a party asserted a claim or defense with "a complete absence of a justiciable issue of either law or fact." Fla. Stat. § 57.105 (Supp. 1978). Thus, the amended statute broadens the scope of conduct that is subject to sanctions.

The Court reasoned that under the amended statute, an appellee could be subject to sanctions for defending a trial court order that was patently erroneous and not supported by facts or law. Although such circumstances would be rare, the Court noted that the presumption of correctness that applies to trial court orders does not shield an appellee from sanctions as a matter of law.

Boca Burger argued that allowing sanctions against an appellee for defending a trial court order would have a chilling effect on

appellate representation. The Court dismissed this argument, noting that an attorney's ethical obligations already prevent the type of conduct contemplated by the statute. As the Court pointed out, an attorney's duty of candor to a tribunal outweighs the duty to represent a client zealously. When a trial court's action is clearly erroneous, either due to a misconception by the court or a misrepresentation by trial counsel, appellate counsel has a duty to inform the appellate court of the error.

SIGNIFICANCE

Boca Burger is significant because it clarified the rule that a plaintiff may amend a complaint once as a matter of right, at any time prior to service of a responsive pleading, and that the trial court has no discretion to deny such an amendment. Additionally, *Boca Burger* held that a party may properly assert the defense of federal preemption in a motion to dismiss. Further, the 1999 amendment to Florida Statutes Section 57.105 opened the door for sanctions against an appellee or an appellee's counsel for defending a trial court order that is patently erroneous, when counsel did not act in good faith and knew or should have known that a claim or defense was unsupported by facts or law. Lastly, *Boca Burger* explains how the 1999 amendment expands the statute's potential use to authorize the imposition of more sanctions.

RESEARCH REFERENCE

- 40 Fla. Jur. 2d *Pleadings* §§ 161, 165 (2005).

Shannon A. Treadway

Civil Procedure: Service of Process

Dor Cha, Inc. v. Hollingsworth,
876 So. 2d 678 (Fla. 4th Dist. App. 2004)

A party seeking to use constructive service rather than actual service will not have conducted a diligent search if the party does not make an honest and conscientious effort to inquire of all readily available sources of information.

FACTS AND PROCEDURAL HISTORY

The plaintiff, Wendell S. Hollingsworth, sued a dissolved corporation to quiet title to four vacant lots. In his diligent search affidavit, Hollingsworth detailed his efforts to locate the corporate principal, including a thorough computer search to locate the corporate principal's name. Using this name, Hollingsworth was able to obtain an address from the State of Florida Department of Highway Safety and Motor Vehicles, Division of Driver Licenses (DMV). Hollingsworth then attempted to serve the corporate defendant, Dor Cha, using the principal's address obtained from the DMV. However, Hollingsworth discovered that the address did not exist and consequently used service by publication. Because Hollingsworth misspelled the corporate principal's name when he conducted the search, all of his efforts were directed towards the wrong individual.

The circuit court entered a default judgment in favor of Hollingsworth. Dor Cha moved to set aside the default judgment. Dor Cha argued that defective and inadequate service of process rendered the final judgment void. The circuit court denied the motion, reasoning that Florida Rule of Civil Procedure 1.540 required such a motion to be brought within one year and allege a meritorious defense. On appeal, the Fourth District Court of Appeal reversed and remanded for further proceedings.

ANALYSIS

On appeal, Dor Cha argued that a motion to vacate a void judgment for inadequate service of process does not have to comply with the requirements of Florida Rule of Civil Procedure 1.540. Hollingsworth, however, argued that the default judgment was proper because he complied with the statutory requirements for constructive service. The Fourth District held that a motion seeking to void judgment for inadequate service of process may be brought at any time and does not have to allege a meritorious defense.

Constructive service is proper only when a party can prove that it could not make personal service. Florida Statutes Section 49.051 provides that prior to constructive service, a party must execute a sworn statement that a diligent search and inquiry were conducted to ascertain the names and whereabouts of any persons who would bind the corporation. Fla. Stat. § 49.051

(2004). Statutes that regulate constructive service are strictly construed. *Canzoniero v. Canzoniero*, 305 So. 2d 801, 803 (Fla. 4th Dist. App. 1975).

The Fourth District found constructive service is proper when "[t]he plaintiff [can] show an honest and conscientious effort, reasonably appropriate to the circumstances, to acquire the information necessary to fully comply with the controlling statutes." *Dor Cha, Inc.*, 876 So. 2d at 680 (citing *Gans v. Healthgate-Sunflower Homeowners Assn., Inc.*, 593 So. 2d 549, 551 (Fla. 4th Dist. App. 1992)). The court did not consider Hollingsworth's attempt to locate the corporate principal using a misspelled name to be a "careful" search. Moreover, when Hollingsworth discovered that the address obtained from the DMV did not exist, he did nothing further to ascertain the corporate principal's whereabouts.

The Fourth District relied on a case from the Second District Court of Appeal that provided the parameters of a diligent search: "'[i]t is basic that to constitute diligent search and inquiry to discover the whereabouts of a party, that inquiry should be made of persons likely or presumed to know such whereabouts.'" *Id.* (quoting *Mayo v. Mayo*, 344 So. 2d 933, 936 (Fla. 2d Dist. App. 1977)).

The Fourth District found that Hollingsworth's efforts did not constitute a diligent search because he failed to inquire of Dor Cha's known attorney. Hollingsworth therefore failed to utilize available sources of information to discover the corporate principal's whereabouts. Because Hollingsworth failed to show an honest effort to conduct a diligent search, he failed to show personal service could not be made; therefore, constructive service was defective. Accordingly, the Fourth District reversed the order denying the motion and remanded.

SIGNIFICANCE

Constructive service is statutorily permitted only when personal service is impossible. Attacks concerning the validity of service of process may be made at any time and do not require a meritorious defense. For constructive service to be upheld, a party's sworn statement must show that the party exhausted all possible means when conducting a diligent search and inquiry. For a corporate defendant, a party must use all available sources of information to discover the names and whereabouts of all per-

sons upon whom service would bind the corporation. A good faith, but mistaken, search will not constitute a diligent search.

RESEARCH REFERENCES

- 5 Fla. Prac. *Civil Practice* § 8.6 (2006 ed.).
- 41A Fla. Jur. 2d *Process* §§ 49, 54 (2004 & Supp. 2005).

Mary Ellen Pullum

Civil Procedure: Subject Matter Jurisdiction

Industrial Communications and Electronics, Inc. v. Monroe County,
134 Fed. Appx. 314 (11th Cir. 2005)

Federal district and circuit courts lack subject matter jurisdiction to hear claims that are "inextricably intertwined" with claims raised in a state trial court, as well as those claims that have already been litigated in state courts.

FACTS AND PROCEDURAL HISTORY

In 1998, Industrial Communications and Electronics, Inc. (ICE) sought to erect a 1,000-foot communication tower in Monroe County, Florida. In February 2001, the county adopted a moratorium on communication towers taller than 100 feet. ICE sued in state court for declaratory and injunctive relief, alleging federal statutory and constitutional violations. The County amended its moratorium in a way that would have continued to prohibit the proposed ICE tower, and in September 2001, the County enacted an ordinance prohibiting all communication towers higher than 350 feet.

The state trial court upheld the County's initial moratorium as a valid exercise of police power. ICE did not appeal but subsequently sued in federal court, challenging only the moratorium—not the ordinance. The Federal District Court for the Middle District of Florida granted the County's "motion to dismiss on grounds of res judicata or collateral estoppel." *Indus. Commun. & Elec.*, 134 Fed. Appx. at 316. ICE appealed. The Eleventh Circuit Court of Appeals vacated and remanded the case with instructions to dismiss for lack of subject matter jurisdiction.

ANALYSIS

Even though neither party questioned the federal court's jurisdiction over the subject matter of the federal claim, the Eleventh Circuit determined that such jurisdiction was lacking. A lower federal court may not hear cases that are, in effect, appeals from state court decisions.

The *Rooker-Feldman* doctrine provides that the United States Supreme Court is the only federal court that has appellate jurisdiction over state court decisions. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C.C. of App. v. Feldman*, 460 U.S. 462 (1983)). Federal district and circuit courts lack subject matter jurisdiction if a claim requires a determination that a state court decision was wrong or asks that a state court decision be voided. *Desi's Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 419 (3d Cir. 2003). The *Rooker-Feldman* doctrine applies to claims that were litigated in state court, claims that could have been raised in state court, and claims that were "inextricably intertwined" with a state court decision. *Feldman*, 460 U.S. at 482. In *Industrial Communications & Electronics*, the Eleventh Circuit determined that the district court had dismissed ICE's claim on the merits, when, in fact, the claim should have been dismissed for lack of subject matter jurisdiction.

The test for application of the *Rooker-Feldman* doctrine contains four criteria; if these are met, the lower federal courts—district and circuit—lack subject matter jurisdiction over the case. *Amos v. Glynn County Bd. of Tax Assessors*, 347 F.3d 1249, 1265 (11th Cir. 2003). The criteria are as follows:

> (1) the party in federal court is the same as the party in state court; (2) the prior state court ruling was a final or conclusive judgment on the merits; (3) the party seeking relief in federal court had a reasonable opportunity to raise its federal claim in the state court proceeding; and (4) the issue before the federal court was either adjudicated by the state court or was inextricably intertwined with the state court's judgment.

Id.

In this case, the Eleventh Circuit determined that the first two criteria were clearly met: the party (ICE) was the same in

both the state and federal case, and the state court decision was final or conclusive on the merits. The Eleventh Circuit further concluded that ICE "had the opportunity to raise its federal claims in the state court proceeding," so the third criterion was also met. *Indus. Commun. & Elec.*, 134 Fed. Appx. at 318. Finally, the court determined that all of ICE's federal claims were at least "inextricably intertwined" with the state court judgment and that ICE had, in fact, had the opportunity to raise those claims in state court. *Id.* at 318–319. ICE could not "circumvent" application of the *Rooker-Feldman* doctrine and attempt to use the federal courts to attack the state court judgment; ICE's proper response to losing in state court would have been an appeal either to the state appellate court or the United States Supreme Court.

SIGNIFICANCE

The lower federal courts do not have appellate jurisdiction over state court decisions even when the state court rules on claims that are federal in nature. The federal courts will not permit a party to have, in effect, two shots at litigating claims that are the same or even "inextricably intertwined." A party that loses in state court can pursue an appeal in state court or in the United States Supreme Court, but not in any other federal court.

RESEARCH REFERENCES

- 32A Am. Jur. 2d *Federal Courts* § 1040 (2004).
- Suzanna Sherry, *Judicial Federalism in the Trenches*: *The* Rooker-Feldman *Doctrine in Action*, 74 Notre Dame L. Rev. 1085 (1999).

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