What Can Florida Attorneys Expect with Justice Canady II?

by Jed Kurzban & Lauren Gallagher

July 1, 2018 marked the second time Justice Charles T. Canady took over the leadership of the Florida Supreme Court. In 2008, Justice Canady was appointed to the Florida Supreme Court by Gov. Charlie Crist. He served as chief justice from July 2010 through June 2012. Now he will serve as chief justice for a second time. This begs the question, what can Florida attorneys expect this second time around?

Prior to his position on the Court, Justice Canady coined the term "partial birth abortion" in his fight for a nationally publicized bill banning the practice in 1995. In 1998, Justice Canady was one of 13 House Republicans selected to oversee President Bill Clinton's impeachment trial. Prior to his appointment to the Florida Supreme Court in 2008, Justice Canady served in all three branches of state government.

Justice Canady is viewed as part of three-justice conservative minority on the Court as it is presently constituted. He frequently dissents with the Court majority. Although many of the Court's decisions are unanimous, dissents by Justice Canady are common in cases of individuals doing battle with corporations. On these occasions, Justice Canady usually dissents in favor of corporations — the results of which attempt to significantly limit the rights of individuals. In addition to civil cases, on the occasions when the Court overturns a murder conviction or reduces a sentence from death to life in the criminal context, Justice Canady usually dissents.

One of the highest-profile cases in which Justice Canady dissented, *Whiley v. Scott*, was a case involving a dispute about state agency rule-making. The majority found that Gov. Rick Scott exceeded his authority by putting a hold on agency rules until his office could review them. Yet, Justice Canady dissented stating that such a position was "ill-conceived interference with the constitutional authority and responsibility of Florida's governor." The majority's ruling allowed individuals continued access to the legal system in order to protect their individual rights.

Examples of Justice Canady's dissents include, in 2011, *Sosa v. Safeway Premium Fin. Co.*, a Florida class certification case. In discussing its approach to commonality, the majority emphasized Safeway's "common course of conduct and business practice" overcharging members of the class. However, Justice Canady instead reasoned that Sosa could not show a course of conduct evidencing Safeway's knowing violation of a statute.

In a majority opinion authored by Justice Canady in 2012, in *Atwater v. Kortum*, the majority struck down a state statute regulating solicitation by public insurance adjusters. The regulation sought to limit public adjusters' attempts to solicit business in the wake of the devastating hurricanes in 2004 and 2005. However, Justice Canady found the regulation ran afoul of the state's commercial speech protections and was not narrowly tailored to the state's interests.

In *GEICO General Insurance v. Virtual Imaging Services, Inc.*, decided in 2013, the majority ruled in favor of medical provider Virtual Imaging Services, Inc. in a dispute against GEICO about payments for imaging tests that were performed after a GEICO customer was injured. The majority ruled in favor of Virtual Imaging because it said GEICO had not disclosed in the policy that it would use the Medicare formula which limits treatment to injured victims. Yet, Justice Canady dissented arguing that state law did not make the use of the Medicare-related fee amounts "operative only if it is specifically referred to in the text of the relevant policy."

In 2014, in *Tracey v. State*, the majority suppressed evidence obtained after police accessed the defendant's cell site location data without a warrant. However, Justice Canady dissented, arguing that accessing the cell site location data did not violate the Fourth Amendment right against unreasonable searches and seizures because cell site location data

fell within the third-party disclosure doctrine. Justice Canady held that the defendant had no legitimate expectation of privacy in his cell site location data.

In 2015, the Florida Supreme Court in *Aubin v. Union Carbide* directed juries to use a more consumer-friendly test in strict products liability cases. However, the dissent authored by Justice Polston, and joined by Justice Canady, argued that Union Carbide deserved a new trial, "since the jury instructions on Aubin's failure to warn claims — namely, '[a]n asbestos manufacturer, such as Union Carbide Corp., has a duty to warn end users of an unreasonable danger in the contemplated use of its products' — was misleading." The dissent argued that this instruction failed to inform the jury about Union Carbide's learned-intermediary defense which allows companies to discharge their duty by warning intermediate manufacturers and relying on them to warn the end users.

In 2016, in *Hernandez v. Crespo*, the Supreme Court of Florida ruled that a medical malpractice arbitration agreement executed by a woman who delivered a stillborn fetus after being turned away from a doctor's appointment was void as a matter of public policy. The ruling is a major victory for those harmed as a result of potential medical negligence, because had the Court upheld the agreement as binding, plaintiff would have been forced to handle her dispute through a private arbitration process, rather than the public courts. In his dissent, Justice Canady wrote that "[n]othing in the Medical Malpractice Act can be read to support the conclusion that the purpose of the statute is thwarted by voluntary pre-dispute agreements ... designed to limit the cost of litigation and the amount of paid claims. Instead, such voluntary agreements are designed to cure the same mischief that the statute seeks to address."

In *Hurst v. Florida,* decided in 2016, the majority of the Court invalidated Florida's death penalty statute, holding that the death penalty may only be imposed by a unanimous jury. Yet, Justice Canady dissented, arguing that the Sixth Amendment does not compel the majority's result.

In *Weaver v. Myers*, the majority held that ex parte interviews wit medical malpractice claimant's treating physician are unconstitutio In this 2017 decision, the Court held that the statutory amendme Fla. Stat. 766.106 and 766.1065, unconstitutionally require claima to waive the right to privacy as to both relevant and irrelevant med information. In a dissent authored by Justice Canady, joined by Justi Lawson and Polston, it was argued that because the amendments did "require" a waiver or forfeiture of any privacy rights that are not alre waived by the plaintiff's own action in pursuing a malpractice claim, amendments cannot unconstitutionally condition a plaintiff's right access to courts on the waiver of the right to privacy.

In *Edwards v. Thomas*, the Florida Supreme Court was asked to decid records from external peer review reports are discoverable under Amer ment 7, and what it means for documents to be "made or received in t course of business." In 2017, the Court held that external peer revi reports are discoverable under Amendment 7. Justice Lawson dissent and Justice Canady concurred with the dissent on the basis that the pl language of the Florida Constitution required the Court to approve t Second District's decision shielding expert reports prepared in anti pation of litigation — rather than in the course of business — fro disclosure pursuant to Amendment 7. The dissent therefore conclud that "the expert reports at issue — prepared at the request of the hospit counsel, outside of the ordinary peer review process, in anticipation imminent litigation — are not "records made or received in the cou of business" subject to disclosure pursuant to Amendment 7.

In 2017, in *Charles v. Southern Baptist Hospital of Florida, Inc.*, t Florida Supreme Court held that hospital and physician incident r ports required by Florida law are not protected from discovery by t Federal Patient Safety and Quality Improvement Act ("PSQIA") a Amendment 7 is not preempted by federal law. Thus, Florida medic negligence plaintiffs can obtain records regarding a health care provide previous history of adverse medical incidents. Justice Canady authore a dissent, calling the majority's decision "purely advisory," due to t filing of a stipulation for dismissal by the parties prior to Oral Argumen

In 2018, in *State v. Phillips*, Phillips, a convicted criminal, served his prison term. However, four months after his expected release date, the state initiated civil commitment proceedings against him. The majority's opinion found this timeline constitutionally problematic. Yet, Justice Canady dissented, reasoning that substantive due process does not preclude a state from bringing a confinement petition simply because the "process is initiated at a time when the person is in custody due to legal error."

Dissents by Justice Canady are also common on questions of access to the court by individuals. As such, Justice Canady tends to take a stricter view of what it means to be in conflict for jurisdictional purposes. Furthermore, Justice Canady holds firm regarding the need for courts to not encroach on the legislative branch. This ideology significantly limits an individual's access to courts.

In *Franks v. Bowers*, a decision involving medical malpractice arbitration provisions, the Florida Supreme Court struck down a medical malpractice arbitration provision that differed substantially from Florida's statutory arbitration provision and violated public policy. Justice Canady wrote a dissent in which he disagreed on the jurisdictional question with the majority stating that the Court lacked conflict jurisdiction. Justice Canady's dissent also asserted that the arbitration agreement was in line with his view of Florida's public policy.

In *Joerg v. State Farm Mut. Auto. Ins. Co.*, the majority held that defendants are precluded from introducing evidence regarding collateral source benefits that plaintiffs may receive in the future from social legislation, such as Medicare and Medicaid. This 2015 decision removes a tool that could be used to diminish the jury award for the plaintiffs' future damages. Yet, Justice Canady concurred in the dissent which concluded that the Florida Supreme Court does not have the constitutional authority to review this case. The dissent indicated that "because both this Court in *Stanley* and the Second District in *Joerg* concluded that only government benefits earned in some way by the plaintiff should be excluded from evidence under the collateral source rule, no conflict exists."

In *League of Women Voters of Florida v. Detzner*, decided in 2015, the Florida Supreme Court ordered the redrawing of select congressional districts. Justice Canady's dissent accused the majority of ignoring separation of powers principles and exceeding the proper scope of appellate court review.

In 2016, in *Fridman v. Safeco Ins. Co.*, the majority held that an insured is entitled to a jury determination of liability and the full extent of damages, even if in excess of policy limits, prior to litigating a first-party bad faith action arising from an underlying uninsured/underinsured motorist ("UM") case. Again, Justices Polston and Canady dissented based on lack of jurisdiction.

In 2016, in *Johnson v. Omega Insurance Co.*, the Florida Supreme Court reinforced the principle that once a policyholder proves it is owed more money after filing a lawsuit, that policyholder has a vested right to attorneys' fees and costs. This is a significant protection for Florida's policyholders. Justice Canady's dissent turned on technicalities. He argued that the Court did not have jurisdiction to hear the appeal and thus the merits of her case didn't matter.

Also in 2016, the Florida Supreme Court ruled in favor of the plaintiffs in *Westphal v. City of St. Pete.*, holding that cutting off disability benefits after 104 weeks to a worker who is totally disabled and incapable of working but who has not yet reached maximum medical improvement is unconstitutional. However, Justice Canady, in a dissent joined by Justice Ricky Polston, indicated that the Court should look to the Legislature's policymaking powers in deciding the issue. Justice Canady argued that the decision to substantially increase weekly compensation for temporary total disability and to reduce the number of weeks that such benefits are paid is a matter of policy within the province of the Legislature.

In 2017, in *North Broward Hospital District v. Kalitan*, the Florida Supreme Court ruled that caps on noneconomic damages in medical malpractice lawsuits violated the equal protection clause. However, in a dissent authored by Justice Polston, joined by Justices Canady and Lawson, it was argued that "It is the Legislature's task to decide whether a medical malpractice crisis exists, whether a medical malpractice crisis has abated, and whether the Florida Statutes should be amended accordingly."

In 2017, in *Dockswell v. Bethesda Memorial Hospital*, the Florida Supreme Court ruled that the statutory presumption regarding foreign bodies unintentionally left in surgical patients applies even where there is direct evidence of medical negligence. Again, Justices Polston and Canady dissented based on lack of jurisdiction.

Now Justice Canady will serve as Chief Justice during a time of change on the Court. In January of 2019, Justices Barbara Pariente, R. Fred Lewis and Peggy Quince will step down because of the mandatory retirement age. This impending turnover of nearly half of the seven-member Court could bring major changes with more conservative, anti-abortion, and pro-corporation justices. The challenge for Florida attorneys going forward is one of finding the proper legal questions to help obtain the most balanced field for injured victims, citizens and accused individuals.

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