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Civil Cases of the Middle District of Florida

Susan Black

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by Circuit Judge Susan Black, District Judge Harvey Schlesinger, and Sylvia Walbolt

Editor's Note: Judges Black and Schlesinger and Attorney Sylvia Walbolt presented the overview of the civil cases as a panel discussion using slides to illustrate case points. Their presentation has been modified for a reading audience. Bankruptcy Judge Karen Jennemann introduced the panel.

Judge Karen Jennemann's Introduction of the panel participants:

The Honorable Susan H. Black is truly the judge's judge in so far as she has had judicial offices in virtually every capacity in the State of Florida. She served as a Duval County Judge from 1973 to 1975 and then became a Circuit Judge in the Fourth Judicial Circuit in 1975 and served there for four years until President Jimmy Carter appointed her to the federal District Court on May 22, 1979. Consistent with Professor Denham's comments, the confirmation process was completed quicker in those days and she was actually confirmed just about 5 or 6 weeks later on July 23.

Upon joining the District Court, Judge Black made her name quickly in the Jacksonville area, while she also earned a Masters from the University of Virginia in 1984. She served as Chief Judge from 1990 to 1992. I think in virtually every one of those positions she was the first woman to do all of it. So she is truly a trend setter.

In 1992, President George H. W. Bush appointed her to the Eleventh Circuit Court of Appeals. Once again, she sped through

confirmation and has been on the Eleventh Circuit since then. In February of last year, she took senior status, although from my conversation with her I don't think she is any less busy than she was before.

Judge Harvey Schlesinger was born in New York, went to college at the Citadel and then entered law school at the University of Richmond. He served in the U.S. Army as a captain for three years before he came to Florida. He ultimately went to work in the U.S. Attorney's office in Jacksonville and, in 1975, was appointed as a Magistrate Judge in the Jacksonville Division. In 1991, President George H.W. Bush nominated Judge Schlesinger to the District Court, replacing his good friend Judge Howell W. Melton.

In June 2006, Judge Schlesinger entered senior status. He, however, is also no less busy. If anyone in Jacksonville needs something done, the first person you ask is Judge Schlesinger and he is the one with the reputation that will get whatever needs to be done completed. I have had the privilege of working with Judge Schlesinger on the historical project since roughly 2006 and it has been a joy to work with him on these projects and get to know him much better. He has been a wise and kind man and I look forward to hearing his thoughts on the civil cases you'll hear about.

And last, but certainly not least, we have attorney Sylvia Walbolt on the panel. She has been practicing almost from the creation of our District. She is an appellate lawyer who has handled hundreds of appeals in all types of law from torts to products liability, business disputes, construction, securities, antitrust, and employment. It is indeed a pleasure to have someone with her breadth of experience on our panel. She is a certified Appellate Lawyer in the State of Florida. She is a member of the American College of Trial Lawyers and now is devoting much of her time to teaching young lawyers the skills of trial and appellate advocacy and I know that they all are benefiting from her instruction and assistance. As I prepared my introduction ,I wondered how many of the cases arising out of the District have seen her involvement.

Sylvia Walbolt:

As you might guess, there have been hundreds and hundreds of civil cases coming out of this District over the last 50 years and it was a lot of fun reading many of them and picking out which ones our judge panel would discuss.

Judge Susan Black:

Judge Schlesinger and Sylvia Walbolt and I spent a couple of hours talking about cases and we thought "how can we do this in [the] thirty minutes [allotted for the session]?" We have picked a potpourri of cases and narrowed the number to six: I will discuss three cases and Judge Schlesinger will discuss three.

Costello v. Wainwright is the first case. Let me begin in 1972 with two inmates - one being Michael V. Costello who alleged that the overcrowding in the state prison system and lack of minimally adequate mental care in Florida systematically violated the Eighth Amendment's cruel and unusual punishment clause. At the time of the complaint, roughly 10,300 inmates were incarcerated in a prison system designed to accommodate 7,000 and, at most, 8,300 during emergencies. In the plaintiffs' prison, for instance, the actual inmate population was nearly double its recommended capacity. One cell roughly housed four persons.

In 1975, the District Court for the Middle District of Florida found substantial constitutional violations on a state-wide basis, including severe overcrowding that exacerbated deficiencies in the delivery of adequate medical care. The court entered a preliminary injunction that was very broad and required the State of Florida to reduce prison population or increase prison capacity. Ultimately, there was a settlement agreement and, at that time, those who were involved thought that was the end of the case. The settlement agreement, however, was not the end of the case.

The inmates' challenges to prison conditions continued into the early 1990's and the State of Florida was accused of routinely breaching the terms of the settlement agreement by failing to alleviate the prison conditions of overcrowding and inadequacies in the delivery of medical care. Dick Julian, the former dean at the University of Florida College of Law, was appointed special master to insure substantial compliance by the State with the conditions of the settlement agreement. It sounded simple. It was not simple, but it was the work of dedicated lawyers and Dean Julian's constant surveillance - and I call it that because rather than just serving as a special master, he became very involved in the case and learned a great deal about prisons.

The District Court entered a final judgment in the *Costello* case in 1993, reasoning that, unlike most prison litigation cases that remain open indefinitely, state officials had provided significant

assurances that the improvement of the prison conditions would be sustained. Dean Julian's recommendations were adopted and remained in force. Over 20 years after it began, the District Court supervision ended, the litigation was deemed a success, and the case was closed in the Middle District of Florida.

Sylvia Walbolt:

And so was that, Judge, essentially the end of that case after that judgment was entered?

Judge Susan Black:

It was the end of the case. The state-wide litigation ended but it was not the end of litigation. Litigation became pinpointed. There would be particular institutions that were alleged to be inadequate either because of overcrowding or medical conditions. One example was the *Thomas v. Bryant* case that was appealed in 2010 and that was an Eighth Amendment challenge to the use of chemical agents on mentally ill inmates. One of the Middle District judges entered the order in the case and the Eleventh Circuit affirmed that order.

This is an example of continuing litigation in the state prison system but this state litigation ended and I think I would be remiss as a postscript if I didn't at least mention the *Ruiz* case, which was heard in the Fifth Circuit. It is a Texas case that started in 1972 at the same time the Middle District case was filed. It followed a similar track but ended almost 12 years after the Middle District case ended, costing the State of Texas millions of dollars that the State of Florida was spared by the ending of the litigation earlier in Florida.

The next case law area, admiralty, has an important impact in the State of Florida and especially so in the Middle District. A glance at a map of the Middle District will show two major Cargo Gateway ports in Tampa and Jacksonville. These deepwater ports are the source of much of the admiralty litigation. We will present a Tampa case and a Jacksonville case.

The Skyway Bridge case, which is familiar to many, began in May 1980. It arose from a tragedy in which a shipping vessel, the *Summit Venture*, struck the Sunshine Skyway Bridge and caused a collapse of the bridge that led to the deaths of 35 people and countless injuries. Twenty-six of the dead had been passengers on a Greyhound bus that went off the bridge.

Hercules Carriers, owner of the *Summit Venture*, sought exoneration from or limitation of liability in response to the Florida Department of Transportation's Motion for Summary Judgment that asserted the ship's pilot caused the accident by failing to reduce speed or anchor once visibility was limited. Hercules Carriers contended that the accident's legal and proximate cause was the onset of sudden high intensity storms and that the pilot's navigation decisions were reasonable in light of the circumstances. I think that every admiralty lawyer in the State of Florida participated in this litigation.

Based on principles of admiralty, Hercules Carriers was entitled to exoneration *only* if it could show the storm was the *sole* cause of the collision. The District Court reasoned that inclement weather was merely a condition related to the accident. It did not present inherent dangers sufficient to cause the accident independent of the pilot's negligence. The major contributing cause of the disaster, the court held, was the pilot's failure to anchor ship once visibility was reduced below one mile. By continuing, as he did, to go full speed and navigating solely by reference to radar, the pilot was the legal cause of the accident and Hercules Carriers was not entitled to exoneration.

About the same time in Jacksonville, construction was scheduled to get underway on the Dames Point Bridge that would connect Duval and Nassau Counties across the St. John's River. After several years of false starts, the Jacksonville Transportation Authority received approval to begin construction of the bridge in 1979. But before construction commenced, a group of businessmen challenged the administrative decision and along the grounds that you would expect: first, the permit authorizing the construction was invalid because the agency never articulated the basis for its decision; second, the agency's decision to issue the permit was arbitrary and capricious; and, third, if not arbitrary and capricious, the decision was invalid because the agency failed to conduct appropriate risk assessments studies.

It was interesting that the risk assessments study issue, which is the last one mentioned, was of course on deferential agency review. However, the timing of this case provides an interesting juxtaposition. This case was filed in 1979 and the Skyway Bridge accident was in 1980, but the allegations here were made before the Skyway Bridge accident. Part of the claim was that the channel is narrow and if you don't go through the center of the channel, you can hit the bridge and endanger lives. The District Court for the Middle District of Florida granted summary judgment in favor of the agency on all

issues. Thus, the agency's decision was upheld. The Dames Point Bridge is now the third busiest bridge in Jacksonville, with more than seven to eight thousand vehicles crossing it daily.

Judge Harvey Schlesinger:

In deciding which three cases to select for historical purposes, Sylvia Walbolt provided us with a list of all the Middle District of Florida cases that went to the U. S. Supreme Court and then refined the list to discover how may times these cases were cited by other courts to give us some idea of what importance the Middle District of Florida civil cases have played. Out of that list, I selected three. The first case is, as Judge Black said, an admiralty case - *Atlantic Sounding vs. Townsend.* The issue in this case was whether a common law claim for lack of maintenance and cure, if the conduct was willful and intentional, could lead to punitive damages for an injured seaman. I ruled that it could, the decision was affirmed by the Eleventh Circuit, and when it went to the Supreme Court it turned out that there was a 5/4 affirmance by the Supreme Court. The four dissenters were Justices Samuel A. Alito Jr., John G. Roberts Jr., Antonin Scalia and Anthony M.Kennedy. The five who affirmed the decision were Justices Clarence Thomas, John Paul Stevens, David H. Souter, Ruth Badar Ginsberg and Stephen G. Breyer. This was the first time that the four, for lack of a more specific term, the supposed four liberals agreed and joined in an opinion written by Justice Thomas.

Never happened before, never happened again and to bring a little humanistic side to the story - after the case came down, Justice Thomas was speaking at the University of Florida Law School. I hopped in the car and went down there. I took a slip opinion of *Atlantic,* hoping to have him autograph it. And Justice Thomas has a very good sense of humor. For those of you who attended the dedication of the new Orlando courthouse, you probably don't know this but a day before the ceremony I got a phone call from Judge Patricia Fawsett who said "could you do me a favor and bring one of your extra robes to Orlando because Justice Thomas needs one and you are about the only one on the court that is the same size." Which I did. When I spoke to Justice Thomas at the University, we started laughing about the way the Supreme Court had lined up in this case and I said "what am I supposed to tell people about the lineup," and he remarked, "well, remember in Orlando when you loaned me a robe, just tell them I owed you one."

Although it was listed as an admiralty case, the that the Supreme Court had to resolve was a common law complaint – whether the Jones Act or the Death on the High Seas Act did away with the common law right to bring a punitive damage claim for lack of maintenance and cure. And I had concluded that the *Miles* case, in which the Supreme Court held that the Jones Act precluded recovery for loss of consortium, didn't apply because this was a claim for punitive damages. The Ninth Circuit and the Fourth Circuit already had decided that you couldn't get punitive damages but the Supreme Court went the other way.

I want to read one portion of the dissenting opinion: "Endorsing what was termed as a principal of uniformity, *Miles* teaches that if a former relief is not available on the statutory claim we should be reluctant to permit such relief on a similar claim brought under the General Admiralty Law." Talking to Justice Thomas about it, that sounded to me like a little bit of what you would call an activist judge deciding "I am going to take a statute and make it apply to common law when the statute didn't say we repeal whatever, whatever." And, that was the thought that I wanted to share with you.

Two other cases that I am going to talk about are the *Barnett Bank of Marin Kennedy v. Gallagher,* and the *Lords v. Medtronics.* These two preemption cases moved from the Middle District of Florida during the same term of the Supreme Court in 1996; they had identical preemption issues, and both wten to the Supreme Court. In one case I held there was no federal preemption and was reversed; and, in one case I held there was preemption, and I was reversed. I picked one of each and nobody agreed with me except in the first case, *Barnett Bank.*

Barnett Bank acquired an insurance agency and started selling life insurance out of a bank. This action violated a Florida Insurance regulation that prohibited national banks from selling insurance in cities with populations of less than 5,000. A provision in the 1913 Federal Reserve Act allowed for the sale of insurance in these small communities. I concluded that because, in1863, the Supreme Court had ruled that life insurance - or an insurance policy- was not covered by the Commerce Clause, Congress could not regulate insurance under the Commerce Clause, a ruling that was not changed until roughly 1942. I concluded that there was no way when the Federal Reserve Act was written in 1913 that Congress could have imagined themselves controlling insurance sales in national banks and that this was a banking statute, not an insurance statute.

When the case went up to the Eleventh Circuit, Ed Judges Cox, Peter T. Fay and Emmett Ripley Carnes agreed with me and held that, under the McCarren Ferguson Act, state law would prevail over the federal law in this, an insurance matter. Unfortunately, the U.S. Supreme Court reversed the Circuit Court ruling in an opinion written by Justice Breyer. There was total preemption by the Federal Reserve Bank. I continue to disagree with the ruling but when people ask "how do you feel after a decision that you have made gets reversed by the Supreme Court on a 9 to nothing vote?" my answer is "don't ask me, but ask those three judges who agreed with me and got reversed."

The *Lohr* case was a very interesting one and that it turned out that Judge Black was on the Eleventh Circuit panel. That case involved leads on an electronic pacemaker. When the leads failed, a female patient almost died. The legal question that I had to address was whether the Medical Device Act preempted a common law negligence claim under Florida law. I ruled that the Medical Device Act ("MDA") did preempt because this device had been approved by the FDA and a claim could not be brought under Florida law.

The Eleventh Circuit concluded that the state law claim of negligent manufacturing was preempted by the MDA, the claim of negligent failure to warn was also preempted, but the negligent design claim was not preempted and the strict liability claim was not preempted. The Supreme Court affirmed in part and reversed in part. The Court ruled basically that the medical device act did not preempt any of the state claims that were brought. In this ruling, the Eleventh Circuit was affirmed in the part in which they said there was no preemption and was reversed on the part where they said that there was preemption.

Sylvia Walbolt:

As illustrated by this small sample of Middle District of Florida decisions rendered in the past fifty years, the Middle District of Florida Judges have interpreted complex and nuanced legal issues confronting the polity and issued precedential decisions that impacted beyond the district's border. To this day, the opinions of Middle District Florida continue to exemplify scholarly and thorough analysis of cutting-edge legal issues affecting all facades of daily life. It is this jurisprudential legacy, which will dictate the Middle District's next fifty years.