

**CASE LAW SUMMARY**  
**2010**

**Negligence**

**Alcohol**

*Archbishop Carroll High School v. Maynoldi*, 47 So. 3d 1289 (Fla. 3d DCA 2010)

A high school was sued for injuries sustained by a student in an automobile accident which occurred while the student was driving after consuming alcohol at an end of the year party at a private residence. The party at which the student had the alcohol was not a school sponsored or school related event. Notably, the school principal was aware of the party and the principal actually questioned the students at whose home the party was to take place about the party. The principal and school administrative staff also read a “skit” over the school public address system on the morning of the party suggesting that they intended to raid the party and bring drug sniffing dogs to it. Further, the principal actually went to the party to follow through on his threat to visit and to personally see that things were okay. He also confirmed that the mother of one of the students was at home. He then left the party. Alcohol was consumed in the pool area in the back of the house and in cars. The student who was severely injured and his classmate brought beer and vodka from a convenience store and drank in his car.

The Third District held that neither the school principal’s visit to the home during the party or the school’s handbook regarding parties created a duty on the part of the school under the Undertaker’s Doctrine. They also held that the trial court erred in striking the school’s affirmative defense raised pursuant to Florida Statute §768.36. The trial court held that the statute did not apply as a matter of law because the student was not the plaintiff; rather, his parents were the plaintiffs in their individual and representative capacity. They found that the derivative claimants (the parents) should not have greater rights than the injured minor under the facts of this case.

## **Future Earning Capacity**

*Subaqueous Services v. Corbin*, 25 So. 3d 1260 (Fla. 1<sup>st</sup> DCA 2010)

A crab fisherman was injured when his boat hit a large pipeline that was submerged to 2-8” below the surface of a water marker. On the same day, a friend of the plaintiff was working in the same area and, around the same time, his boat also collided with the same pipeline.

As part of the evidence at trial, the plaintiff’s vocational rehabilitation expert testified that the plaintiff’s earning capacity as a commercial fisherman was \$25,790 annually. The expert called the estimate “conservative” and found that the plaintiff was now only suited to perform sedentary light duty work which would earn him between \$7 and \$9 an hour or \$15,000 - \$18,000 annually. This information was based upon a series of compiled general statistics.

The First District criticized the expert’s computation of damages because the plaintiff’s tax return showed an average net annual income of just over \$11,000. The expert explained that the tax returns did not reflect the extent of gross revenue in a cash-based business like fishing. The court also criticized the information upon which the expert relied upon in reaching his conclusions about earning capacity. Rather than limiting the inquiry to “fishing related occupations” the expert surveyed a broad range of vocations and used incomes and statistics from occupational codes compiled by the United States Bureau of Labor Statistics which included managers in farming, forestry, animal breeding, etc. Because the evidence supported that the plaintiff would only ever be a fisherman, these statistics were inapplicable. The court also rejected the award for future medical expenses finding that there was no testimony to support the need for future surgery which cost \$30,000.

## **Hiring of Independent Contractors**

*Davies v. Commercial Metals*, 46 So. 3d 71 (Fla. 5<sup>th</sup> DCA 2010)

In affirming summary judgment in favor C&W Trucking, the court reiterated that Florida recognizes a viable claim for negligent selection of an independent contractor where a Plaintiff can plead ultimate facts showing: (1) the contractor was incompetent or unfit to perform the work; (2) the employer knew or should have known of the employee’s particular incompetence or unfitness; and, (3) the incompetence or unfitness was a proximate cause of the Plaintiff’s injury.

Here, the Plaintiff could not establish as a matter of law the element of proximate cause because there was nothing to suggest that the contractor was unfit or incompetent to perform the work at issue where the contractor did not drive more hours than permitted by law the day before the accident; the driver had a full's night rest; equipment was in good condition; and there was nothing to suggest that equipment failure contributed to the accident.

### IME

*Gaskins v. Canty*, 29 So. 3d 432 (Fla. 2d DCA 2010)

The trial court ordered that the plaintiff attend a vocational rehabilitation examination. The order provided that the examination could be recorded by using an unattended videotape or audiotape machine, but it prohibited the presence of any third person such as a videographer or the plaintiff's attorney.

After the defendant sought the examination, the plaintiff responded that she would appear for the examination accompanied by her counsel or a videographer. The defendant filed a motion to compel the examination with limitations and attached an affidavit from the examining expert who asserted that the examination involved time testing that could not be interrupted by the changing of videotapes; the presence of a videographer could negatively affect the examination; and numerous psychological articles show that observation might affect the examination.

The Second District quashed the trial court's order and granted certiorari. In doing so, they noted that while this was originally a request for a rehabilitation examination, the request was amended to be for a life plan examination because the plaintiff had dropped her claim for future loss of earning capacity. The examining expert was not present at the hearing and did not provide any evidence concerning the specifics of a life plan examination or why the presence of third person would disrupt the examination. Further, there was no evidence presented that no other examiner would conduct the examination with a third person present.

## **Medicare/Medicaid Liens**

*Russell v. Agency for Health Care Administration*, 23 So. 3d 1266 (Fla. 2d DCA 2010)

The Plaintiff filed a medical malpractice action on behalf of her son. A settlement was reached and the trial court ordered full satisfaction of the Medicaid lien from the proceeds of the settlement. The case was settled for \$3 million dollars and the lien was for \$221,434. The settlement agreement contained no allocation of the amount recovered amongst the various elements of damages suffered nor did the parties to the settlement or AHCA otherwise agree to such an allocation. Because the lien amount did not exceed 50% of the amount recovered by the settlement, the Second District affirmed the trial court's decision finding that AHCA was entitled to full satisfaction of its lien pursuant to Florida Statute 409.910 (11)(f)(1).

The Second District rejected the Plaintiff's reliance on the United States Supreme Court decision of *Arkansas Department of Health v. Ahlborn*, 547 U.S. 268 (2006) finding that in *Ahlborn*, the state stipulated to the portion of the settlement attributable to the medical expenses also noting that it exceeded that portion of the settlement that represented payment for medical care. In this case, there was no such stipulation and no similar basis for determining an allocation of the settlement proceeds.

## **Negligent Entrustment/Undertaking**

*Cantalupo v. Lewis*, 47 So. 3d 896 (Fla. 4<sup>th</sup> DCA 2010)

The Defendant and his brother went out to a restaurant where the brother drank several glasses of bourbon. While leaving the restaurant, the Defendant asked for his brother's keys because he felt his brother had too much to drink. His brother handed over the keys and the Defendant drove himself and his brother to the Defendant's home. The Defendant then put the keys in the kitchen and went into his home office to do some work while his brother remained in the other side of the house. Later that evening, the Defendant's brother came into the office. The Defendant recognized that his brother had been drinking more and was in worse shape than when they left the restaurant. His brother indicated that he had the keys and he was going to go home. The Defendant told his brother that it would be best if he stayed the night and his brother once again agreed and handed over the keys. Within ten minutes, the Defendant went into the living room and

put the keys on a hutch which was 20 feet away from the couch in which his brother would be sleeping.

The Defendant did not keep the keys because he did not want his brother to wake him and his wife up when he left for work the following morning. Thereafter, the Defendant went back to his office and a few minutes later, he went into the living room and saw his brother lying on the couch with his eyes closed. The Defendant then went to bed. Within approximately 45 minutes, the Defendant's brother got up, took the keys and left the house. He drove the wrong way down a nearby road and collided head on with another vehicle whereupon the Defendant's brother and Cantalupo were killed. The Defendant obtained summary judgment.

The Fourth District held that the Defendant could not be liable for negligent entrustment or negligent undertaking and affirmed the summary judgment. The Fourth District found that the mere placement of the car keys on the hutch where his brother could find them does not constitute supplying the keys or the car to his brother. It further noted that the Defendant did not have any duty to prevent his brother from driving under the influence and that, at most, by allowing his brother to obtain the keys, the Defendant did no more than restore the risk of harm to the level which existed when he and his brother originally left the restaurant.

### **Negligent Hiring/Retention**

*Magill v. Bartlett Towing*, 35 So. 3d 1017 (Fla. 5<sup>th</sup> DCA 2010)

The Plaintiff suffered personal injuries when a Bartlett employee violently pushed her to the ground immediately prior to stealing her car. At the time of the attack, the Plaintiff was not seeking any towing services from Bartlett. The Plaintiff alleged that the tow truck driver had a lengthy criminal history prior to being hired by Bartlett including arrests for forgery, grand theft of a motor vehicle, dealing in stolen property, violation of a pawn broker transaction form, burglary of a dwelling and burglary of a conveyance. The Plaintiff alleged that the tow truck company knew or should have known of this history of criminal behavior and that they owed her and the public a duty to hire and retain competent, qualified and safe employees.

Because the complaint failed to allege facts sufficient to establish a legal duty flowing from the tow truck company to the Plaintiff (the attack did not occur on the Defendant's premises; the driver did not meet the Plaintiff as a direct

consequence of his employment; there was no allegation that the Defendant would receive a benefit or potential benefit from the meeting of its driver and the Plaintiff had the wrongful act not occurred; the Plaintiff had not been dispatched to the location in question nor was the Plaintiff in need of tow truck service) therefore, the complaint was properly dismissed.

The Plaintiff also argued that by entrusting the driver with a uniform and a tow truck with overhead lights, the Defendant provided the driver with the “indicia of authority” which help to facilitate his illegal conduct and therefore made the tow truck company liable for his actions. The Fifth District rejected this argument finding no authority that would suggest that one has an obligation or duty to comply with another person’s directive because that other person is wearing a tow truck service uniform and/or is driving a tow truck vehicle with emergency lights on.

*Morales v. Weil*, 44 So. 3d 173 (Fla. 4<sup>th</sup> DCA 2010)

The Plaintiff, an employee of an independent contractor hired to demolish a barn, was injured while demolishing the barn. The worker claimed that the barn owner was negligent in failing to protect him from injury and failing to provide a safe work place. The court granted summary judgment in favor the barn owner on the first issue and entered directed verdict at the time of trial on the second issue.

On appeal, the Court affirmed the summary judgment and the directed verdict. The Court determined that the barn owner’s control was limited to dictating the results of the demolition job rather than the means used to accomplish same. Therefore, the evidence was not sufficient to overcome the general rule that, one who hires an independent contractor is not liable for injuries sustained by that contractor’s employees in performing their work. Here, the employee was hired to perform a dangerous job and was injured by one of the incidental hazards which made the job dangerous.

### **Prior Similar Incidents**

*Subaqueous Services v. Corbin*, 25 So. 3d 1260 (Fla. 1<sup>st</sup> DCA 2010)

A crab fisherman was injured when his boat hit a large pipeline that was submerged to 2-8” below the surface of a water marker. On the same day, a friend of the plaintiff was working in the same area and, around the same time, his boat also collided with the same pipeline.

As part of the evidence at trial, the plaintiff's vocational rehabilitation expert testified that the plaintiff's earning capacity as a commercial fisherman was \$25,790 annually. The expert called the estimate "conservative" and found that the plaintiff was now only suited to perform sedentary light duty work which would earn him between \$7 and \$9 an hour or \$15,000 - \$18,000 annually. This information was based upon a series of compiled general statistics.

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*Hogan v. Gray Gable*, 30 So. 3d 573 (Fla. 1<sup>st</sup> DCA 2010)

The plaintiff was a surgeon who volunteered to sit in a dunking booth at a fundraiser sponsored by his hospital and the American Cancer Society. The hospital borrowed a dunking booth from a local fire department. While climbing inside the booth, the surgeon lacerated his hand on metal mesh and, as a result of the injury, he could no longer perform surgery.

Just before trial began, the fire department sought to offer evidence that there had been no complaints of injury related to the dunking booth since its construction in 1990. The plaintiff objected to the introduction of such non-occurrence evidence arguing that they had not shown that the booth was in a substantially similar condition since its construction in light of testimony regarding modifications that were made to the booth, including addition of the wire mesh and a door between 2000 and 2002. The plaintiff also argued that the defendant could not show that the booth had been previously used at night and under the same lighting conditions. The defendant argued that a showing of substantial similarity

was not necessary because the purpose of offering the evidence was to show that they were not on notice of a dangerous condition in the booth.

Although the trial court's decision to admit evidence of the occurrence or non-occurrence of prior accidents under substantially similar conditions was within the sound discretion of the trial court, the First District held that because of the modifications to the dunking booth, as well as, the fact that the non-occurrence evidence was a feature of the trial, they were unable to determine whether, without the introduction of the non-occurrence evidence, the jury would have reached the same verdict. As such, they found that the introduction of such evidence was harmful and ordered a new trial.

### **Product Liability**

*Liebherr-America v. McCollum*, 43 So. 3d 65 (Fla. 3d DCA 2010)

A longshoreman was run over and killed by a mobile crane at the Port of Miami. The Defendant's role was confined to selling the crane to another Defendant and agreeing to keep it in good repair. It neither designed, manufactured or operated the crane at the time of the accident nor owned or controlled the property where the longshoreman was killed. Nevertheless, the jury found the Defendant partially liable for the death. The Third District found no legal basis for an assignment of liability and reversed the judgment.

In doing so, they noted that the primary duty and responsibility of the seller and servicer of equipment is to insure that the equipment contains no defect which renders it unreasonably dangerous to persons in the vicinity of the crane. In this regard, the jury found that the crane was not defective at the time of sale. The Plaintiff also argued that the Defendant was liable for failing to appropriately service the crane after the sale. Although there was some evidence at the time of the accident (2 years after the sale) that some of the warning devices were not operating properly; however, there was no evidence that these problems had previously occurred or that the Defendant was on notice of these failures or had been guilty of negligence in failing to repair same. Additionally, there was no showing that the failures had any causative link to the accident.

Lastly, the Third District noted that there was no duty on the part of the seller or anyone in the distribution chain to warn of dangers presented by the operation of the equipment after it passed from its control.

## **Psychotherapist-Patient Privilege**

*Cruz-Govin v. Torres*, 28 So. 3d 55 (Fla. 3d DCA 2010)

The Defendant was sued for injuries and wrongful death following a motor vehicle accident. After filing suit, the plaintiff learned that, several months after the accident, the defendant had been admitted to a drug rehabilitation facility. The plaintiff then sought copies of the post-accident substance abuse treatment records. The defendant objected to the production of the records; however, the trial court ordered their production.

The Third District granted certiorari and reversed the trial court. Although Florida Statute 90.503(4)(c) provides an exception to the psychotherapist-patient privilege, it only requires a party to produce communications relevant to an issue involving a mental or an emotional condition when the patient relies upon the condition as an element of his or her claim of defense. The Third District found that the statutory exception applies when the patient and not the opposing party seeks privileged information. Further, the Third District held that the defendant did not place his mental or emotional condition at issue by merely denying the plaintiff's allegations or suggestions that he was impaired at the time of the accident.

## **Punitive Damages**

*Royal Caribbean Cruises, Ltd. v. Doe*, 44 So. 3d 230 (Fla. 3d DCA 2010)

Where a trial court fails to make an evidentiary inquiry and/or factual determination as required by § 768.72, Florida Statutes, it is improper for a court to allow a motion to amend a complaint to include a claim for punitive damages. The trial court must determine whether the evidence would reasonably support a finding that: (1) the conduct was intentional or constituted gross negligence; and (2) the party actively and knowingly participated in the conduct.

## **Releases**

*Bender v. CareGivers of America, Inc.*, 42 So. 3d 893 (Fla. 4<sup>th</sup> DCA 2010)

The Plaintiff contracted with Caregivers for home-health services. At two month intervals, the Plaintiff signed a Release entitled "Transportation Responsibility Release". The relevant portion of the Release stated:

Client understands and agrees to release (hold harmless) the aide, Caregivers of America and its representatives from any and all liability resulting from the use of the aide's vehicle for client transportation. Client understands that Caregivers of America's policy does not cover physical loss, bodily injury, property damage or any other liability, including liability towards Client, stemming from vehicle-related incidents.

Thereafter, one of Caregiver's home health aides was driving the Plaintiff on an errand and was involved in an automobile accident. Based upon imputed negligence under the doctrine of respondeat superior, the Plaintiff sued Caregivers alleging that the aide was negligent and Caregivers was liable. Caregivers moved for a summary judgment based upon the Transportation Responsibility Release.

The Fourth District reversed finding that a pre-incident release was not effective to preclude an action based on the subsequent negligence the party released unless the instrument clearly and specifically provides for a limitation or elimination of liability for such acts. The Fourth District has previously held "that an exculpatory agreement must expressly include the term 'negligence' to clearly and specifically meet the requirement of ... being clear and unequivocal." Caregivers contended that it was not required to make a specific reference to negligence because its liability, if any, was based upon vicarious liability and not direct negligence. The Fourth District found no authority for this proposition and therefore reversed the summary judgment.

### **Sovereign Immunity**

*Francis v. School Board of Palm Beach County*, 29 So. 3d 441 (Fla. 4<sup>th</sup> DCA 2010)

A mother sued the School Board for damages related to the death of her daughter who was struck and killed by a car while walking to a school bus stop. The School Board moved to dismiss the complaint arguing that it was immune from suit because the placement of the bus stop was a planning level function. The trial court agreed and the Fourth District affirmed.

The mother attempted to argue that the School Board was negligent for, amongst other reasons, instructing her daughter to cross the road to another bus stop and in failing to warn the child of the dangers in crossing the road and that the

School Board was liable because these were operational decisions. The School Board argued that it did not owe a duty of care to the child while she was en route to her bus stop and that the School Board's actions were not the proximate cause of the death. The Fourth District agreed and also rejected that the School Board created a known dangerous condition finding that a busy roadway was not so inconspicuous as to virtually constitute a trap.

*Estate of Smith v. Florida Department of Children and Families*, 34 So. 3d 181 (Fla. 1<sup>st</sup> DCA 2010)

An employee at the Florida State Hospital suffered a fatal heart attack at work after intervening in a violent physical confrontation between an inmate and a co-worker. At the time of his death, Mr. Smith was a unit training rehabilitation specialist at the hospital's forensic unit which houses people deemed incompetent to stand trial or found not guilty by reason of insanity. The State filed a wrongful death lawsuit against DCF which operated the hospital and alleged that the department had engaged in conduct virtually certain to cause injury or death to an employee. The allegation of the Plaintiff's Complaint tracked the language of Florida Statute §440.11(1)(b) which is the intentional tort exception to the worker's compensation immunity. While the trial court agreed with Plaintiff's allegations, it dismissed the case finding that there was no case against DCF because the State had not waived sovereign immunity for the "wanton and willful disregard" of a person's safety. In so doing they held that when the provisions of Florida Statute 440.11(1) and Section 768.28 conflict, the provisions of 768.28 control.

*Marion v. City of Boca Raton*, 47 So. 3d 334 (Fla. 4<sup>th</sup> DCA 2010)

The trial court entered summary judgment in favor of the City of Boca Raton in a negligent maintenance suit finding no causation between the negligent maintenance of the City's traffic light in an intersectional collision which caused injury to the Plaintiff. Maintenance of traffic control devices is an operational activity thereby constituting a waiver of sovereign immunity. In this case, the traffic control device malfunctioned three times in a space of 36 hours prior to the accident, defaulting to a flashing light mode. The City maintained that the flashing yellow light functioned properly. The Fourth District noted that the City had an obligation to warn when the traffic light malfunctioned and that while the flashing light may have constituted a warning, it did not absolve the City of its obligation to properly maintain the traffic control device. Additionally, the trial court had ruled that the flashing yellow light was not the cause of the accident; however, the

Fourth District found that the issue as to whether the operator of the other car was a superseding intervening cause and was one for the jury to decide.

### **Statute of Limitations/Statute of Repose**

*AVCO Corp. v. Neff*, 30 So. 3d 597 (Fla. 1<sup>st</sup> DCA 2010)

A private plane was involved in a crash in 2004. The NTSB investigated the crash and found that the carburetor was damaged and some of its related parts were worn. Less than 2 years after the accident, a complaint was filed against various defendants alleging, in part, that the carburetor installed in the aircraft was defectively designed and caused the crash. The complaint alleged that the engine manufacturer and corporate successor to the carburetor manufacturer knew that the design was subject to failure and that they failed to warn the FAA and the general public of such failures.

The defendants moved for summary judgment arguing that the claims were barred by the 18 year Statute of Repose under the General Aviation Revitalization Act (GARA) and the 12 year Statute of Repose under Florida law. AVCO asserted that it did not manufacture anything for the aircraft subsequent to its original delivery in 1981. The other defendants provided similar evidence. The trial court denied the defendant's motion for summary judgment and the defendant filed a Petition for Certiorari.

The First District found that these statutes were more akin to statutes of limitation rather than grants of qualified immunity. Therefore, any error concerning the trial court's ruling on the affirmative defense could be corrected on an appeal from a final order and the fact that the defendants would incur litigation expenses was not enough to meet the test for irreparable harm for certiorari.

### **Undertaker's Doctrine**

*Archbishop Carroll High School v. Maynoldi*, 30 So. 3d 533 (Fla. 3d DCA 2010)

A high school was sued for injuries sustained by a student in an automobile accident which occurred while the student was driving after consuming alcohol at an end of the year party at a private residence. The party at which the student had the alcohol was not a school sponsored or school related event. Notably, the school principal was aware of the party and the principal actually questioned the students at whose home the party was to take place about the party. The principal

and school administrative staff also read a “skit” over the school public address system on the morning of the party suggesting that they intended to raid the party and bring drug sniffing dogs to it. Further, the principal actually went to the party to follow through on his threat to visit and to personally see that things were okay. He also confirmed that the mother of one of the students was at home. He then left the party. Alcohol was consumed in the pool area in the back of the house and in cars. The student who was severely injured and his classmate brought beer and vodka from a convenience store and drank in his car.

The Third District held that neither the school principal’s visit to the home during the party or the school’s handbook regarding parties created a duty on the part of the school under the Undertaker’s Doctrine. They also held that the trial court erred in striking the school’s affirmative defense raised pursuant to Florida Statute §768.36. The trial court held that the statute did not apply as a matter of law because the student was not the plaintiff; rather, his parents were the plaintiffs in their individual and representative capacity. They found that the derivative claimants (the parents) should not have greater rights than the injured minor under the facts of this case.

### **Worker’s Compensation Immunity**

*Catalfumo Construction v. Varella*, 28 So. 3d 963 (Fla. 3d DCA 2010)

A subcontractor was leaving the job site and going home when he fell over some cement runoff and was injured. His employer denied worker’s compensation benefits to him on the grounds that the accident did not happen within the course and scope of his employment. The worker then sued the general contractor for negligence. The Third District found that the general contractor was a statutory employer as defined in § 440.11, Fla. Stat. and, therefore, was obligated to provide worker’s compensation insurance even when the subcontractor did not. As a result, the general contractor was required not only to provide the coverage for its employee, but was also protected from suits such as this case. The court reversed the order finding no compensation immunity.

*Coastal Masonry, Inc. v. Gutierrez*, 30 So. 3d 545 (Fla. 3d DCA 2010)

The plaintiff filed a petition seeking worker’s compensation benefits from his employer, Coastal, for injuries sustained while lifting concrete blocks. In response to the petition, Coastal denied the claim in its entirety including that his condition arose out of the course and scope of employment. Based upon Coastal’s

denial, the employee voluntarily dismissed his petition for worker's compensation benefits and then filed a negligence action against Coastal. In its response to the complaint, Coastal raised the worker's compensation immunity and moved for summary judgment. The trial court denied the motion for summary judgment. The Third District affirmed and found that the employer was estopped from raising the worker's compensation exclusivity defense in the negligence action.

*Hunt v. Corrections Corp. of America*, 38 So. 3d 173 (Fla. 1<sup>st</sup> DCA 2010)

Action by nurses employed at a county jail held hostage by inmates that escaped from their cells was not subject to the intentional torts exception to the Worker's Compensation immunity. There was no allegation that the employer knew, based on a prior accident or explicit warning, that the inmates would break free from their cells to abduct the Plaintiffs and there was no suggestion that the employer deliberately intended to injure the Plaintiffs. The pleadings themselves precluded application of the unrelated work exception where there were no references to wrongful acts of a co-employee contained in the Complaint. The unrelated work exception to an immunity defense is an avoidance that must be pled specifically and proved by the Plaintiff. Pursuant to Rule 1.140, Florida Rules of Civil Procedure.

*Barnett v. Bank of America*, 45 So. 3d 948 (Fla. 3d DCA 2010)

The Plaintiff, a bank employee, sued for injuries sustained while in the course and scope of her employment with Bank of America, contending that the intentional tort exception to Worker's Compensation immunity applied. The Plaintiff argued that the bank engaged in conduct which was essentially certain to result in injury or death by requiring its employees to work in the middle of a construction site and not make proper accommodations for noxious fumes. The lower court entered summary judgment in favor of the bank finding that the Worker's Compensation immunity applied. On appeal, the Third District reversed summary judgment finding disputed issues of material fact existed. The Court held that the substantial certainty test was, however, applicable to cases involving non-fatal injuries such as the one at issue.

### **Wrongful Death**

*Greenfield v. Daniels*, 35 FLW S685 (Fla. 11/24/10)

The Supreme Court held that a survivor's claim may be brought on behalf of a child who is alleged to be the decedent's biological child, but whose mother was married to another man at the time of the child's conception and birth. Under Florida law, a child born to an intact marriage is required to have the husband's name listed as the father on the birth certificate. Nevertheless, this child was allowed to bring a survivor's claim for the death of his putative father. Moreover, the Supreme Court determined that the facts necessary to establish that the child qualifies as a survivor may be determined in the wrongful death action rather than in a paternity action brought under Florida Statute 742.

*Capone v. Philip Morris, USA, Inc.*, 35 FLW D2639 (Fla. 3d DCA 12/1/10)

In 2005, the Plaintiffs filed a Complaint against Philip Morris and other manufacturers alleging that Mr. Capone suffered personal injuries as a result of smoking the Defendant's cigarettes. In 2006, the husband died. In 2008, his wife moved to amend the Complaint to assert which she claimed was a new cause of action pursuant to a Supreme Court decision and moved to substitute herself as the Estate's Personal Representative. Thereafter, the Defendant filed a motion to dismiss claiming that the personal injury action was abated when he died and that any action for wrongful death had to be filed as a new lawsuit. The motions were not noticed for hearing until after the expiration of the 2 year Statute of Limitations as to the wrongful death action. Eventually, the trial court dismissed the action and the Third District affirmed noting that the personal injury claim had abated upon his death and that the surviving wife was required to file a separate wrongful death claim.