2008
CASE LAW SUMMARY

Procedural and Legal Issues

Arbitration

Kalman v. Pasco-Hernando Surgical Associates, 974 So.2d 1219 (Fla. 2d DCA 2008).

A non-binding arbitration was held and the defendant failed to file a motion for trial in accordance with F.R.C.P. 1.820(h) within 20 days of the service of the Arbitrator's decision. A judgment was entered against the defendant and the trial court subsequently vacated the judgment. The Second District held that the failure to timely file the motion was due to mistake and inadvertence and upheld the setting aside of the judgment.

Strominger v. AmSouth Bank, 991 So.2d 1030 (Fla. 2d DCA 2008).

Plaintiff filed a claim against the bank in small claims court. The record reflects that the case was mediated, and set for trial on 2 occasions. An amended claim was subsequently filed under the Florida Consumer Collections Practices Act and the case was ultimately transferred to county court. There the bank raised that the claims were subject to arbitration, but they did not file a motion to compel arbitration because of the minimal exposure that the case represented. The parties then engaged in discovery. The claim was amended again and transferred to circuit court.

The bank then filed its first motion to compel arbitration almost 3 years after the initial lawsuit was filed. The trial court granted the motion to compel arbitration and the Second District reversed and found that the bank had waived its right to arbitration by active participation in litigation. Waiver by active participation does not require proof of prejudice; it merely requires activity that constitutes or implies a voluntary and intentional relinquishment of a known right.

Attorney's Fees

Devido v. Curry, 973 So.2d 1287 (Fla. 4th DCA 2008).

Devido filed a prior appeal which was dismissed as untimely. Curry never filed a motion seeking appellate attorney's fees and, upon remand, moved the trial court for appellate attorney's fees which was granted. The Fourth District reversed and held that "a trial court may not award appellate attorney's fees absent a mandate from the appellate court."

Rabbit Hill Homeowners Ass'n. v. Cory, 975 So.2d 663 (Fla. 1st DCA 2008).

The First District held that the trial court properly awarded attorney's fees to the Plaintiff, even though entitlement to attorney's fees was not raised in the pleadings because the defendant recognized and acquiesced to the attorney's fees claimed thereby waiving its right to insist that the claim be set forth in the pleading.

Manzini & Assoc. v. Broward Sheriff's Office, 976 So.2d 688 (Fla. 4th DCA 2008), *rev. denied*, 990 So.2d 1059 (Fla. 2008).

Plaintiff retained an attorney to represent her in a civil rights action, however, she discharged this counsel when she chose to settle and release all of her claims against her employer in a workers' compensation case. Thereafter, the attorney in the civil rights action sought to set aside the release and sought leave of court to continue with the civil rights action in order to protect his fee claims. Finding that the workers' compensation attorneys were not involved in an attempt to defraud the civil right attorney of his fee, The Fourth District upheld the dismissal of his claim, however, they held that he was entitled to recover a reasonable fee for the work performed by way of *quantum meruit*.

Sanchez v. State Farm Florida Insurance Co., 997 So. 2d 1209 (Fla. 3d DCA 12/24/08).

The Appellee's Motion for Attorney's Fees was denied after the appellant voluntarily dismissed their appeal before briefs were filed. The only papers filed by the appellee were a three-paragraph Motion to Impose Sanctions and a four-paragraph Motion for Attorney's Fees. The Third District denied the claim pursuant to §768.79 finding that the activity in the appellate court was "de minimis."

Nathan v. Bates, 34 FLW D15 (Fla. 3d DCA 12/24/08).

After being sued, the defendants sent a letter to plaintiff's counsel threatening to seek attorney's fees pursuant to §57.105. Approximately 9 months later, they served a Motion for Attorney's Fees pursuant to this statute, but they filed it with the court three days later. Because statutes awarding attorney's fees are in derogation of the common law and therefore must be strictly construed, the Third District found that the award of attorney's fees pursuant to this statute was improper because the statute specifically provides that "a motion by a party seeking sanctions under this section must be served but must not be filed with or presented to the court unless, within 21 days after the service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." The Third District emphasized that the statute provides for the demand to be made by motion and not by letter.

Certiorari

Stihl, Inc. v. Green Thumb Lawn & Garden Center, 974 So.2d 1200 (Fla. 5th DCA 2008).

Discovery order was not in conformity with the trial court's pronouncements and allowed for discovery of items with no geographical and time limitations. The Fifth District granted certiorari and quashed the discovery order finding it to be overbroad, burdensome and contrary to the essential requirements of law noting that certiorari is an appropriate remedy for a discovery order compelling compliance with patently overbroad discovery requests.

Sutton v. State, 975 So.2d 1073 (Fla. 2008).

Defendants filed identical motions to disqualify a trial court judge based upon the alleged bias of the judge towards the defendant's attorneys. Motions to disqualify were denied and the defendants then requested that the circuit court issue writs of prohibition directing the county court judge to take no further action. The Circuit court denied the petitions for writ of prohibition and a petition for certiorari was filed. The Supreme Court ruled that the proper method to review the order denying the petition for writ of prohibition by certiorari.

East Coast Electric v. Dunn, 979 So.2d 1018 (Fla. 3d DCA 2008), *rev. denied*, 996 So. 2d 211 (Fla. 2008).

Plaintiffs filed lawsuits against manufacturer and electrician for injuries sustained while testing an uncovered bus bar. The bus bar was manufactured and shipped without the proper end caps and installed by the contractor. In its motion for summary judgment, the manufacturer admitted the lack of proper end caps, but argued that the contractor's recognition of the missing end cap and their decision to supply power to the bus way acted as a superseding and intervening cause thereby extinguishing liability on behalf of the manufacturer. The contractor opposed the manufacturer's motion and argued that it was foreseeable that the contractor would have powered up the bus way without the end caps in place. The trial court granted the summary judgment finding that the contractor's decision to energize the bus way was an unforeseeable intervening cause. The Third District affirmed the finding that their act of energizing the bus way system without the bus bars in place was so far beyond the realm of foreseeability that the manufacturer could not be held liable as a matter of law. It further held that it was not reasonably foreseeable that the contractor would act in such a reckless manner.

Romanos v. Caldwell, 980 So.2d 1091 *(Fla. 4th DCA 2008).*

A defendant in a medical malpractice action, appealed the trial court's order preventing him from deposing the plaintiff's counsel. The defendant was a psychiatrist who was being sued by the decedent's widow as a result of her husband's suicide after the psychiatrist had prescribed anti-depressants. The plaintiff's counsel had known the decedent for a number of years and had played golf with the decedent 3 days before he took his life. The trial court refused to permit the psychiatrist to depose the plaintiff's counsel unless the physician agreed to waive any potential disqualification of counsel from serving as counsel at the time of trial. The Fourth District held that there was no departure from the essential requirements of law that warranted the court's exercising its certiorari jurisdiction.

Capco Properties v. Monterey Gardens at Pinecrest, 982 So. 2d 1211 *(*Fla. 3d DCA 2008), *rev. denied*, 2009 WL 36455 (Fla. 2009).

Claim was brought against the defendants for breach of implied warranty of fitness and merchantability, as well as other claims regarding the

sale of a condominium. The claim also included damages for fraudulent transfer based upon allegations that defendants made cash distributions to its members which rendered the company insolvent. The defendant filed a motion to dismiss and the plaintiff propounded "intrusive financial discovery" which included financial statements, balance sheets, profit and loss statements, documentation reflecting distributions, statements of all bank accounts, and all canceled checks. The Third District granted certiorari and found that the discovery requested was generally only discoverable in aide of execution after judgment has been entered. It further held that because there was no claim for punitive damages, the discovery of the requested financial information was neither relevant nor would it lead to the discovery of relevant information.

Costco Wholesale Corp. v. Defilippo, 991 So.2d 998 (Fla. 4th DCA 2008).

Plaintiff sued Costco for negligence alleging that a Costco employee dropped a table on his foot. An interrogatory questioned whether there had been any accidents at the subject premises within 3 years of the incident and asked for other details on the accidents. Costco objected to the discovery and the court overruled the objection and simultaneously directed Costco to provide all records related to prior accidents resulting in an injury for the 3 year time period prior to the date of this incident. The Fourth District granted Certiorari based upon Costco's argument that it was denied procedural due process rights and because no request for production asking for these documents had been made by plaintiff.

Ford Motor Co. v. Hall-Edwards, 997 So.2d 1148 (Fla. 3d DCA 2008).

In this wrongful death suit for alleged defects based upon the design of a motor vehicle, the trial court ordered that the defendant provide access to its Litigation Matters Management System database. The Third District found that the database functioned as an attorney notebook to record thoughts, impressions, opinions and strategy of defendant's attorneys about litigation which was immune from discovery from work-product privilege. Further, the database contained confidential communications which were immune from discovery under the attorney-client privilege. They also found that the trial court departed from the essential requirements of law in requiring the defendants to provide "suspension orders" which were communications issued by attorneys in defendant's Office of General Counsel in connection with anticipated and pending litigation which

provided legal advice concerning documents which should be preserved in connection with those matters. The Third District found that the suspension orders constituted work product and were also protected under attorney-client privilege.

Parker v. James, 997 So.2d 1225 (Fla. 2nd DCA 2008).

Defendant in a personal injury action deposed 2 of the plaintiff's treating physicians. After the depositions were completed, the defendant served interrogatories seeking to find out the scope of the physician's employment in the pending case and the compensation for the service; the physician's litigation experience including the percentage of work performed for plaintiffs and defendants; the identity of other cases in which the witnesses testified by deposition and/or trial; and an approximation of the portion of the physician's professional time spent as an expert witness. Certiorari was granted and the Second District held that the Florida Rules of Civil Procedure do not allow for propounding interrogatories to a non-party witness; whether they are an expert witness or not.

Charging Liens

Hall, Lamb & Hall v. Sherlon Investments Corp., 33 FLW D2540 (Fla. 3d DCA 10/29/08).

Law firm representing a party was discharged before mediation. Prior to discharge, it had a partial contingent fee agreement with its client. Subsequent thereto, the law firm filed a charging lien and, thereafter, the parties reached a settlement agreement. A suspended lawyer representing the client did not pay off the charging lien, but absconded with the money. The Third District found that the opposing party who paid the settlement agreement had an affirmative duty to notify the law firm of the settlement and to protect their interest from the settlement proceeds and that by paying the entire settlement without protecting the law firm's lien interest, this constituted a fraud upon the firm for which they were responsible.

Costs

First Protective Insurance Co. v. Featherston, 978 So.2d 881 (Fla. 2d DCA 2008).

The trial court declined to award costs to a prevailing party because the prevailing party failed to plead entitlement to costs in its initial pleading. In noting that, Fla. Stat. §57.041, does not allow a trial court "discretion to deny recovery of costs to the prevailing party" and that "the recovery of costs is generally available to any party recovering judgment", The Second District reversed the trial court. In so ruling, they noted that "every party to litigation enters the litigation on notice that costs are at issue."

Disclosure of Non Party Records

Graham v. Dacheikh, 991 So.2d 932 (Fla. 2d DCA 2008).

Plaintiff underwent an IME and subsequently requested that the physician who performed the IME produce all of his IME reports prepared between 2004 and 2006. The trial court authorized the doctor to remove the names and identifying information from the reports, however, the reports were to be produced in their entirety without an *in camera* inspection by the trial court and without any provision for confidentiality. The purpose of these medical reports was to give the plaintiff a basis to impeach the examining physician and not to discover evidence relevant to prove the plaintiff's case. The Second District granted certiorari finding that the trial court's order caused irreparable injury to the privacy rights of non-parties who had not been given notice and no opportunity to be heard.

Economic Damages

Maxakoulis v. Kotler, 995 So.2d 1024 (Fla. 4th DCA 2008).

Plaintiff sued his attorneys who represented him in his criminal case. It was determined that the Plaintiff's mother paid the fees on his behalf and that he had no obligation to reimburse her. As such, the Fourth District found that the trial court properly granted summary judgment because the Plaintiff did not suffer any loss and was not entitled to relief.

Economic Loss Rule

Curd v. Mosaic Fertilizer, 993 So.2d 1078 (Fla. 2d DCA 2008).

Commercial fishermen filed a proposed class action against a company which allegedly polluted the waters which they fished, thereby reducing their income. The Second District found that the trial court properly dismissed the action because the fishermen cannot state a claim of negligence or strict liability in order to recover for purely economic losses unrelated to injuries to their persons or property. The Second District certified whether the fishermen can recover for purely economic losses caused by the negligent release of pollutants despite the fact that the fishermen did not own any property damaged by the pollutants.

Expert Witness Fees

Massey v. David, 979 So.2d 931 (Fla. 2008).

Florida Statute §57.071(2) which provides that an expert witness fee may not be awarded as a taxable cost unless the party retaining the expert witness furnishes each opposing party with a written report signed by the expert witness summarizing the expert witness's opinions and the factual basis for the opinions and which requires that such report be filed at least 5 days prior to the expert's deposition, or at least 20 days prior to discovery cutoff was unconstitutional because it encroaches on the rule-making authority of the Florida Supreme Court because it imposes procedural requirements with regard to discovery of expert witnesses and the taxation of expert witness fees as costs.

Fabre

Boza v. Carter, 993 So.2d 561 (Fla. 1st DCA 2008).

For purposes of determining whether an individual is an intentional tortfeasor, "an intentional tort is one in which the actor exhibits a deliberate intent to injure or engages in conduct which is substantially certain to result in injury or death."

False Light

Jews for Jesus v. Rapp, 997 So.2d 1098 (Fla. 2008).

The Supreme Court held that Florida does not recognize the tort of false light because the benefit of recognizing the tort, which only offers a

remedy in relatively few cases was outweighed by the danger in unreasonably impeding constitutionally protected speech.

Fifth Amendment

Urquiza v. Kendall Healthcare Group, 994 So.2d 476 (Fla. 3d DCA 2008).

The defendants in a civil theft and RICO action were also the subject of a federal criminal investigation arising out of the same facts. The plaintiff propounded interrogatories and a request for production to each of the defendants and the defendants asserted a blanket objection to the discovery on the grounds of the 5th Amendment privilege regarding self-incrimination. They also filed a motion to stay the civil proceedings for 6 months on the grounds that, due to the criminal investigation, it would be a violation of their 5th Amendment rights to proceed in a civil action. The trial court overruled the objections and compelled the discovery. The trial court also denied the motion for stay. The Third District sustained the trial court's order finding that a blanket assertion of the 5th Amendment is insufficient to invoke a privilege against self-incrimination. Similarly, a blanket assertion of the privilege is an inadequate basis for the issuance of a stay. Although a trial court may grant a stay in the civil proceeding for a limited time during the pendency of a concurrent criminal proceeding, such a stay is not constitutionally required.

FIGA

Florida Insurance Guaranty Association v. Soto, 979 So.2d 964 (Fla. 3d DCA 2008).

Insurance company reached a settlement with its insured and paid its casualty loss. Before a motion for attorney's fees was heard, the insurance company became insolvent. Subsequently, the trial court granted the motion for attorney's fees and expert witness costs. FIGA took the position that the attorney's fees and costs payable under the pre-insolvency settlement agreement were not covered by FIGA. The trial court disagreed with this position and The Third District affirmed that this was a covered claim eligible for payment by FIGA. They added that while FIGA is not responsible for further attorney's fees and costs incurred by the insured after the insolvency, FIGA was not relieved of the obligation to pay the insured's

attorney's fees and costs incurred pre-insolvency for prevailing on a covered claim.

Forum Non Conveniens

The Scotts Company v. Hacienda Loma Linda, 34 FLW D18 (Fla. 3d DCA 12/24/08).

This lawsuit was previously dismissed for forum non-conveniens with the court having found that Panama would be an adequate alternative forum to resolve the dispute. At that time, the court retained jurisdiction in case the Panamanian courts did not entertain the case based upon pre-emption. The plaintiff then filed a complaint in Panama sufficient to invite dismissal based upon pre-emption and a Panamanian blocking statute. The Plaintiff did not stipulate to jurisdiction nor ask the Panamanian courts not to dismiss on the grounds of pre-emption or the blocking statute. After the case was dismissed in Panama, they took an appeal in Panama and asked the Panamanian appellate court to affirm the lower court's ruling. They then refiled their action in Florida. The Third District dismissed the action and held that where Florida courts determine that a foreign forum is available and adequate, it is the obligation of the plaintiff to assent to the jurisdiction there and to support that court's exercise of jurisdiction over the matter and the parties. They also noted that when a foreign country chooses to turn away its own citizen's lawsuit for damages suffered in that country, it is difficult to understand why Florida's courts should devote resources to the matter.

Fraud on the Court

Granados v. Zehr, 979 So.2d 1155 (Fla. 5th DCA 2008).

The Fifth District reversed the trial court's order granting a Motion to Dismiss Claim for Fraud on the Court where the Plaintiff denied pre-accident back pain and headaches in answers to interrogatories although her medical records reflected her back pain and headaches prior to the accident. The court emphasized that the Plaintiff disclosed the names of her treating physicians; and the natural consequence of this revelation was that her prior treatment for her back pain and headaches was disclosed. It held that the trial court should only dismiss actions for fraud only upon the most blatant showing of fraud, pretense, collusion or other similar wrongdoing. They

also held that in order to dismiss an action for fraud on the court, the moving party must show by clear and convincing evidence that the non-moving party "set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter."

Ibarra v. Izaguirre, 985 So.2d 1117 (Fla. 3d DCA 2008).

Plaintiff filed suit for injuries sustained in an automobile accident. Three years after the accident, he slipped but did not fall at a bank. He reported the incident to the bank and the bank took a recorded statement. In the statement, the Plaintiff advised that he was not in pain immediately after the slip, but felt uncomfortable later that evening. In subsequent depositions and discovery, the Plaintiff repeatedly denied suffering any injuries prior to or subsequent to the automobile accident except for an eye injury which was irrelevant.

The defendant obtained an affidavit from a representative of the bank summarizing the recorded statement taken after the slip incident. The affidavit also stated that the Plaintiff advised the bank that he was attending therapy as a result of his injuries and was pursuing a claim against the bank. Based upon this, the defendant filed a Motion to Dismiss for perjury and fraud on the court and the trial court granted same. The Third District reversed and found that there was no clear and convincing evidence of fraud present because the slip at the bank never resulted in a formal claim. They further noted that his answers could reasonably be viewed as a misinterpretation and the inconsistencies could be handled by impeachment or by cross-examination.

Villasenor v. Martinez, 991 So.2d 433 (Fla. 5th DCA 2008).

The trial court dismissed this suit for fraud on the court. It was alleged that the plaintiff, an illegal alien, perpetrated a fraud on the court by concealing a prior injury, using forged Social Security cards, false Social Security numbers, a fraudulent Alien Registration card and a fictitious Alien Registration number. The Fifth District reversed because of the trial court's failure to conduct an evidentiary hearing to determine whether her conduct was fraudulent, the result of forgetfulness or her limited command of English-language.

Bass v. City of Pembroke Pines, 991 So.2d 1008 (Fla. 4th DCA 2008).

The defendant moved to dismiss the plaintiff's complaint for fraud on the court because the plaintiff failed to disclose medical providers and a significant medical history concerning migraine headaches and depression. The plaintiff admitted the incompleteness of her answers to interrogatories and argued that the failure to disclose her prior migraine headaches was not fraudulent because she disclosed doctors whose records revealed the headaches and the related treatment. In fact, the plaintiff answered another interrogatory about past employment listing the doctor who treated her for migraines, but failed to disclose that he treated her for the headaches. Despite this, the trial court found that her answers to interrogatories were absolute, intentional and untruthful and were intended to impede discovery. Accordingly, the trial court granted the motion to dismiss. The appellate court noted that, because reasonable minds could differ as to the propriety of the trial court's dismissal for fraud on the court, the action was not unreasonable and could not constitute an abuse of discretion.

Ramey v. Haverty Furniture Co., 993 So.2d 1014 (Fla. 2d DCA 2008).

The Plaintiff filed answers to interrogatories stating that the bridge of an entertainment unit fell on its head causing severe headaches, neck injury and TMJ problems. In answers to interrogatories, he admitted that he suffered a prior back injury while on the job in 1988 and received a settlement from his employer at that time. He listed the physician who treated him for his prior back injury and also stated that he had no prior injuries that were aggravated by the incident involving the entertainment unit. In his deposition, the plaintiff denied ever having had neck problems before, was not under doctor's care for headaches, and never had neck problems before. In fact, his treating physician's records indicated a significant history of headaches and neck aches along with lower back pain. The trial court found that there were at least 13 relevant medical entries over an 8 year time period which contradicted the plaintiff's testimony. Based upon these records, The Second District affirmed.

Bologna v. Schlenger, 995 So.2d 526 (Fla. 5th DCA 2008).

The Fifth District reversed an order striking the plaintiff's claims for fraud on the court, and emphasized that a dismissal for fraud is an extraordinary remedy found only in cases where a deliberate scheme to subvert the judicial process has been clearly and convincingly proved.

"Short of this, poor recollection, dissemblance, even lying, can be well managed through cross-examination." They held that testimony of discrepancies is usually not enough and that there must be clear and convincing evidence of a scheme calculated to evade or stymie discovery of facts central to the case. As such, they concluded that almost always this will require an evidentiary hearing.

Offer of Judgment/Proposal for Settlement

Ledesma v. Iglesias, 975 So.2d 1240 (Fla. 4th DCA 2008).

As part of the defendant's offer of judgment, the defendant attached a Release and No-Lien Affidavit. Plaintiff's claimed that they did not accept the proposal because they would have had to "falsely swear under oath that there are no unpaid obligations or liens or the like, when, in truth that there are unpaid obligations or lien or the like." The trial court however, ruled in favor of the defendants and The Fourth District affirmed finding that the language of the Release and Hold Harmless Agreement was clear and unambiguous and only required the plaintiff to indemnify the defendant from any claims of liens.

Liggett Group, Inc. v. Davis, 975 So.2d 1281 (Fla. 4th DCA 2008), *rev. dismissed*, 2008 WL5170616 (Fla. 2008).

A proposal for settlement filed 91 days after the Complaint was filed was in good faith, because at the time the Plaintiff's attorney filed the proposal, they already had the Plaintiff's smoking history, medical treatment, employment history and diagnosis. Further, the proposal was for a figure close to the award made by the jury and was made by the firm experienced in the precise type of liability litigation involved. The Fourth District held that in deciding the amount of attorney's fees to be awarded, the trial courts must not only consider the factors set forth in Fla. Stat. §768.79 and Rule 1.442, but should also consider the results obtained, the time attributable to work on other similar cases, the lack of novelty and complexity of the case, the vast difference between the fees requested and to those which the plaintiff agreed in a retention agreement and the absence of a valid pre-judgment fee agreement between the plaintiffs and a consulting attorney.

Baptiste v. Fermenich, 977 So.2d 658 (Fla. 4th DCA 2008).

The trial court entered an award of attorney's fees to plaintiff based on defendant's offer of judgment which was rejected by the plaintiffs and their recovery exceeded 75% of the rejected offer of judgment. In reversing the trial court, The Fourth District noted that "the rule is that a party who files an offer of judgment can recover attorney's fees if the offer of judgment is rejected and the party who rejected the offer receives less than 75% of the offer of judgment. There is no basis for the party who rejected the offer to recover attorney's fees if the party who rejected the offer recovers at least 75% of the rejected offer of judgment."

Frosti v. Creel, 979 So.2d 912 (Fla. 2008).

Plaintiff served a proposal for settlement on the defendant which was not accepted. A verdict was entered which was more than 125% of the amount of the proposal for settlement. Following the verdict, the plaintiff filed her proposals for settlement and, thereafter, filed a motion for judgment in accordance with the jury verdict and a motion for attorney's fees and costs. The trial court entered judgment and then later denied the plaintiff's motion for attorney's fees finding that the proposal for settlement and the motion for attorney's fees and costs were filed prematurely. The Supreme Court reversed the trial court and held that a motion for attorney's fees and costs predicated upon a valid, rejected proposal for settlement need not be denied because the proposal was filed before judgment was entered.

Clements v. Rose, 982 So.2d 731 (Fla. 1st DCA 2008).

Plaintiff filed a proposal for settlement for $75,000 of which 50% was designated to each defendant. The offer was rejected and a judgment was entered against the defendants (a husband and wife) for an amount which exceeded the total amount of the proposal. The 1st District found that the proposal was not ambiguous as to whether each defendant could have settled separately or whether the settlement offer required both defendants' agreement to settle.

Jacksonville Golfair, Inc. v. Grover, 988 So.2d 1225 (Fla. 1st DCA 2008).

Counter-Plaintiff served a proposal for settlement which agreed to settle all claims asserted against one of the Counter-Defendants and left open the liability of others of in the counterclaim. The Counter-Plaintiff was

successful on its claim and then moved to recover attorney's fees, but the trial court denied same finding that the settlement proposal was ambiguous as to which claims would be settled upon acceptance. The First District held that the proposal was not ambiguous and that F.S. 768.79 and Florida Rules of Civil Procedure 1.442 "do not require that a settlement proposal cover all claims between all parties involved, or that it settle all claims between the parties to the proposal."

Carey-All Transport v. Newby, 989 So.2d 1201 (Fla. 2d DCA 2008).

Plaintiff sued defendant corporation and its former employee for an accident. After the company agreed that it was vicariously responsible for the employee's actions, the employee was dropped. A Proposal for Settlement was served by the defendant who attached a general release which released the company, its agents, servants, employees and former employees. The Plaintiff argued that this language encompassed the former co-defendant and violated the joint proposal rule because it failed to apportion or differentiate the amounts attributable to each defendant. The Second District found that the Proposal for Settlement was valid because at the time that it was served, the former employee was not a party to the litigation.

Attorneys' Title Insurance v. Gorka, 989 So.2d 1210 (Fla. 2d DCA 2008).

Defendant filed a Proposal as to each Plaintiff. The proposal was conditioned upon the offer being accepted by both Plaintiffs; in other words, neither Plaintiff could independently accept their offer without the co-plaintiff-plaintiff joining in the settlement. The Second District held that such proposals were invalid.

Brower-Eger v. Noon, 994 So.2d 1239 (Fla. 4th DCA 2008).

The defendant hired a partnership to remodel her kitchen. During the job, it was alleged that the daughter of one of the partners stole 2 laptop computers from the defendant's residence. As a result, the defendant refused to pay the balance due for the remodeling and the partnership filed suit. The defendant counterclaimed and served a demand for judgment

advising that they would accept $10,000 from all 3 plaintiffs. A bench trial resulted in a net judgment of almost $14,000 for the defendant. The defendant then requested attorney's fees. The defendant argued that requiring apportionment of a demand among partners undermined the joint and several liability of a partner statutorily imposed by Fla. Stat. §620.8306(1). The Fourth District found the argument to be novel, however, they reaffirmed that when an offer is made to or from 2 or more parties, it must specify the amount attributable to each of them.

Privilege

Lloyd's Underwriters at London v. El-Ad Villagio Condominium Association, 976 So.2d 28 (Fla. 4th DCA 2008).

The trial court ordered the production of an entire file of a adjuster used by Lloyd's to assist in investigating and evaluating a claim against it and ordered that the file be produced "cover to cover, including but not limited to all job assignment forms, receipts, correspondence, and every other document, note or paper contained therein." In doing so, the trial court found a compelling interest in the production of documents and found that they were not work product, however, the record reveals that the trial court failed to conduct an *in-camera inspection* of the documents before making the determination that they were not work product. Accordingly, the matter was remanded to the trial court to review the items to determine whether they constitute work product and, if so, whether the respondent is entitled to discovery of the items not withstanding that designation.

Psychotherapist/Patient Privilege

Wilder v. Wilder, 993 So.2d 182 (Fla. 2d DCA 2008).

The wife claimed that a prenuptial agreement was invalid because it was procured through coercion, duress, fraud, misrepresentation, deceit and overreaching. The husband then filed interrogatories which included a request for the names and addresses of every doctor and mental health professional that the wife consulted for a period of approximately a year prior to the execution of the prenuptial through the present.

The wife objected and argued that she had not placed her medical condition at issue. The husband argued that the wife had placed her

emotional state and mental condition at issue because of her assertions. The court held that the psychotherapist-patient privilege and physician-patient confidentiality was not applicable because the husband was not seeking the substance of communications between the wife and medical/mental health professionals and also held that the psychotherapist-patient privilege and physician-patient confidentiality does not apply to protect your contact information for such professionals. The case conflicts with *Weinstock v. Groth*, 659 So.2d 713 (Fla. 5th DCA 1995), and the Second District certified conflict to the Supreme Court.

Releases

Churchville v. GACS, Inc., 973 So.2d 1212 (Fla. 1st DCA 2008).

Plaintiff filed suit against GACS and others and alleged that while employed as a car carrier driver, he suffered injuries while loading and unloading a vehicle on a car carrier trailer. The plaintiff also alleged a 2nd similar injury. The plaintiff had previously filed a workers' compensation claim against his employer and ultimately settled his claim which released his employer and its subsidiaries, affiliates and parent companies. The release did not specifically define affiliates or mention GACS. GACS was, in fact, an affiliated company. The trial court granted summary judgment and the 1st District affirmed finding that the term "affiliate" as used in the context of the Release was unambiguous and that the Release included to the tort claims.

Flynt v. Progressive Consumers Insurance Co., 980 So.2d 1217 (Fla. 5th DCA 2008).

A release was obtained by the insurer of a vehicle's owner which also included a release of claims against the vehicle's driver who had her own insurance. Plaintiff sought reformation or rescission of the release to allow the claim to proceed against the driver. The Fifth District reversed the trial court's granting of summary judgment in favor of the insurance company finding that there were issues of fact regarding whether the inclusion of the driver's name was a result of a mutual mistake or based on a unilateral mistake not as a result of an inexcusable lack of due care.

Sanctions

Burgess v. Pfizer, 990 So.2d 1140 (Fla. 3d DCA 2008).

Plaintiff filed suit claiming she developed liver failure which required a transplant as a result of a participation in a clinical study involving Lipitor. During the 4 years of litigation, plaintiff filed numerous complaints, some containing claims in direct contravention of standing court orders and detailing matters including the Holocaust. The trial court entered an agreed order directing the plaintiff to file her 6th Amended Complaint clarifying her remaining claims. The agreed order expressly barred the plaintiff from adding any new parties or claims. Pursuant to the court's order, the plaintiff had 20 days to file the amended complaint. 35 days after the entry of the order, the defendant filed a motion to dismiss the action due to the plaintiff's failure to comply with the agreed order. The following day, the plaintiff filed her 6th Amended Complaint.

Prior to a hearing on the matter, another defendant advised plaintiff's counsel that the 6th Amended Complaint contravened the agreed order by adding new claims. He then served a corrected 6th Amended Complaint which included most of the improper allegations previously brought to plaintiff's counsel's attention. The trial court then sanctioned the plaintiff's counsel and struck the complaint and dismissed the case with prejudice. In a 2-1 decision, the Third District found that dismissal of the claim with prejudice was too severe a sanction for her attorney's actions, but upheld the trial court's order sanctioning counsel for the fees and costs incurred as a result of his dilatory and disobedient actions. It remanded the action and allowed the plaintiff one final chance to file an Amended Complaint to properly state a cause of action.

DYC Fishing Ltd. v. Martinez, 994 So.2d 461 (Fla. 3d DCA 2008).

The trial court struck the defendant's pleadings after finding that they willfully and deliberately disregarded several court orders which required production of documents which went to the heart of the plaintiff's claims for damages. The Third District reversed after the trial court entered a default final judgment awarding unliquidated damages and noted that "it is well settled in Florida that a default judgment only admits to a plaintiff's entitlement to liquidated damages."

Scallan v. Marriott International, 995 So.2d 1066 (Fla. 5th DCA 2008).

The Plaintiff, a Louisiana resident, sued Marriott for injuries sustained at an Orlando hotel. During the course of the litigation, she was diagnosed with breast cancer and began treatment in Louisiana. Marriott attempted to set her for deposition in Orlando. The plaintiff moved for protective order stating that her doctor believed it was unwise for her to travel because of her condition. She offered to be deposed in Louisiana or via videoconference, but the defendant refused.

The trial court ordered the Plaintiff to submit to a deposition in Orlando or pay Marriott's expenses in order to depose her in Louisiana by a specified date. After her deposition was delayed several times, the trial court struck her pleadings and dismissed her case for failure to comply with the court's order. The Fifth District found that the trial court erred in failing to consider the 6 factors set forth under *Kozel v. Ostendorf,* 629 So.2d 817 (Fla. 1994), which by itself is a basis for remand.

They further found that the alleged misconduct was not egregious enough to require dismissal nor did they find that the plaintiff engaged in willful, deliberate or contumacious conduct to avoid being deposed.

Shortall v. Walt Disney World Hospitality, 997 So.2d 1203 (Fla. 5th DCA 12/24/08).

The trial court dismissed the plaintiff's action with prejudice, finding that she failed to respond to four discovery requests and failed to comply with several aspects of its pretrial order. Because the trial court did not consider the factors set forth in *Kozel v. Ostendorf,* 629 So.2d 817 (Fla. 1994), the Fifth District reversed.

Chmura v. Sam Rodgers Properties, 33 FLW D2591 (Fla. 2d DCA 11/5/08).

In this foreclosure action, the Plaintiff filed a Motion to Compel Discovery after the defendant failed to make herself available for deposition. The defendant alleged that she was unable to participate in the deposition due to a stroke and health problems resulting therefrom. The court directed the defendant to provide access to her physicians and/or her medical records to support her contentions that she was unable to participate in the deposition. After she failed to do so, the plaintiff moved for sanctions and the court struck her pleadings. The Second District reversed because the trial court did not find that the defendant willfully or deliberately

disregarded the court order and, in fact, there was no direct order compelling the discovery ever issued.

Settlement

Ponce v. U-Haul Company of Florida, 979 So.2d 380 (Fla. 4th DCA 2008).

The Fourth District held that the agreement signed by the Plaintiff which stated that it gave its authority to his attorney to "negotiate settlement, sign on my behalf, any and all documents required to settle my pending personal injury/ litigation/workman's compensation cases, including, but not limited: general release, stipulation of settlement, release of claim, settlement drafts, check, or any and all documents required for the settlement of my case whatsoever in nature" did not give the attorney authority to the attorney to file a proposal for settlement on their behalf.

Peraza v. Robles, 983 So.2d 1189 (Fla. 3d DCA 2008).

Following a motor vehicle accident, Plaintiff's counsel offered to settle for $10,000 policy limits. A $10,000 draft was immediately forwarded to counsel along with a letter requesting that the check be held in escrow by the plaintiff's counsel until the insurer received "an unaltered release executed… along with a copy of the U/M Carrier Authorization of Settlement and Waiver of Subrogation Rights." The plaintiff did not negotiate the draft and filed suit. The trial court then enforced the settlement and dismissed the case.

The Third District reversed holding that the insurer's demand for an unaltered release which included an objectionable hold harmless provision and the UM carrier's subrogation waiver did not demonstrate an effective acceptance of the plaintiff's offer. Because the insurer's documents were not shown to be the "usual settlement documents" implicit in any settlement, the court found that this constituted a counteroffer that served as a rejection of the initial demand.

Johnson v. Skarvan, 992 So.2d 873 (Fla. 5th DCA 2008).

The plaintiff sued for damages from a motor vehicle accident. The Defendant scheduled an IME and several days prior to the examination, the Plaintiff told his attorneys that he would be unable to attend the examination because he would be out of town. His counsel advised him that his refusal to attend the examination might result in sanctions including the dismissal of the action. As such, plaintiff authorized his counsel to settle the suit for the total sum of $7,500. Plaintiff's counsel entered into settlement negotiations however, the defendant offered $6,500.

Because he was unable to contact his client prior to the IME and believing it was in his best interest to accept the lesser sum to avoid the possibility of sanctions, Plaintiff's counsel agreed to accept the $6,500. He then filed a Motion to Withdraw claiming lien on the settlement proceeds and also filed a Verified Motion to Enforce Settlement in which he acknowledged that he did not have actual authority from his client to settle for $6,500, but contended that he had implied or apparent authority to compromise because the refusal to attend the IME constituted an emergency justifying the unauthorized settlement. The trial court found that the settlement was in the Plaintiff's best interest and that his counsel had implied authority to settle the case due to the emergency.

The Fifth District reversed noting that the mere employment of an attorney does not give the attorney implied or apparent authority to compromise the client's cause of action or settle the claim. They further noted that an exception to this rule is said to exist "when an attorney is confronted with an emergency which requires an immediate action to protect the client's interest when consultation with the client is impossible." The Fifth District had previously acknowledged this exception, but added that no appellate court had ever found the exception to be applicable. They likewise found that the exception was inapplicable in this case and reversed the trial court.

Antar v. Seamiles, LLC, 994 So.2d 439 (Fla. 3d DCA 2008).

The trial court relieved a defendant from its obligations under a mediation settlement agreement because one of its signatories alleged that he was not bound by the agreement because he failed to read the entire agreement before signing it. In this case, the settlement agreement was signed by this individual once while out of the country and without having had the benefit of reading the entire agreement. Upon his return to the

jurisdiction, he signed it again in front of a notary public and claims that he did not have an opportunity to read the entire agreement before executing it a second time.

The Third District enforced the agreement against the defendant not only because a party to a written contract cannot defend against its enforcement on the basis that he signed it without reading it unless he shows circumstances which prevented his reading the paper, or was induced by the statements of others to not read it. Further, the signatory was actually seeking to enforce the settlement agreement and not disavow it. Accordingly, they directed the trial court to enforce the settlement agreement.

Mastec v. Cue, 994 So.2d 494 (Fla. 3d DCA 2008).

The Third District held that a mediated settlement agreement which was not reduced to writing and signed by the parties was unenforceable pursuant to Fla. R. Civ. P. 1.730(b).

Severance of Claims

Bethany Evangelical Covenant Church v. Calandra, 994 So.2d 478 (Fla. 3d DCA 2008).

Plaintiff filed suit for inappropriate touching of a minor child against the child's teacher, his supervisor, the local church, the regional church and the national church. The trial court severed the claims against the regional church and the national church. The Third District held that the trial court abused its discretion in severing the claims because the facts and issues underlying the claims were intertwined and based on a single injury.

Sovereign Immunity

City of Delray Beach v. St. Juste, 989 So.2d 655 (Fla. 4th DCA 2008).

Plaintiff filed suit against the City because he was injured by 2 loose dogs. The theory of liability was based upon the City's knowledge, from prior complaints, that the dogs were loose from time to time and were dangerous. The Fourth District held that the decisions made by the City's

animal control officer and police to not impound the dogs were discretionary decisions for which the City was immune.

Spoliation of Evidence

Reed v. Alpha Professional Tools, 975 So.2d 1202 (Fla. 5th DCA 2008).

Plaintiff was injured when operating a grinder with a polishing wheel attached when the wheel broke into pieces. One piece struck the plaintiff in his left eye causing permanent blindness. After the accident, the Plaintiff's counsel obtained possession of the polishing wheel, the electric grinder and the safety glasses his client was wearing. After suit was filed, the distributor filed a motion for inspection of the polishing wheel and the plaintiff's counsel advised that the evidence was lost. The distributor filed a motion for dismissal with prejudice or for entry of an appropriate spoliation remedy.

In this case, the plaintiff's expert took extensive photographs of the items and the plaintiff asserted that he could prove his claim based upon the photographs and other specimens of the allegedly defective product. As such, the parties were to be placed on equal footing by limiting the plaintiff to the physical evidence to both parties, i.e., the photographs. In so doing, they noted that "spoliation is not a strict liability concept – lose the evidence, lose the case – no matter whether the plaintiff or the defendant was responsible for the loss." They also noted that the dismissal was premature where, as here, discovery had only just begun. Once essential discovery was completed and the record developed, the trial court could rehear the motion.

Gayer v. Fine Line Construction, 2008 WL 583455 (Fla. 4th DCA 3/5/08).

Plaintiff was supplied to the defendant by a help supply services company. While working for the defendant, he fell from a ladder that he was using to do his work. Following the fall, neither the help supply services company that supplied him nor the defendant were able to locate the ladder from which he fell. The plaintiff brought a spoliation of evidence claim regarding the lost ladder against the help supply services company. Summary judgment was entered on their behalf and the Fourth District upheld the granting of the summary judgment holding that they had no duty to preserve the evidence under Fla. Stat. §440.39(7) or to acquire and preserve evidence that was never in their possession. A prior summary judgment entered against the defendant was previously reversed holding that

"a special employer using a laborer from a help supply services company has a duty under §440.39(7), Fla. Stat. to preserve evidence from the injured laborer's claim against a third-party tortfeasor." *Gayer v. Fine Line Construction*, 977 So.2d 424, 425 (Fla. 4th DCA 2007).

Work Product Privilege

Taylor v. Penske Truck Leasing Corp., 975 So.2d 588 (Fla. 1st DCA 2008).

The plaintiff was in a car accident which he could not remember. As a result, he relied upon his experts to answer interrogatories about the accident, although he wrote his answers in the first person. At plaintiff's deposition, it came to light that he could not remember the details of the accident and relied upon the experts. The defendants then moved to dismiss the case for fraud and in opposition to the motions, the plaintiff asserted the work product privilege. The trial court denied the motions to dismiss, but found that the defendants had shown exceptional circumstances warranting disclosure of the expert opinions and factual basis for the answers to interrogatories. The 1st District found that the trial court departed from the essential requirements of law by finding exceptional circumstances to have existed without having heard any evidence from the defendants as to the need for the information or any undue hardship.

K-Mart Corporation v. Sundmacher, 997 So. 2d1158 (Fla. 3d DCA 2008).

The Third District granted Certiorari and held that the trial court erred in denying the Defendant's Motion to Compel the Plaintiff to produce photographs which depicted the condition of a floor at the time that the plaintiff allegedly fell, having determined that the photographs of the Plaintiff's possession were relevant and material; there was no other means available to obtain the discovery requested; and the photographs were the best evidence of the condition of the floor at the time of the alleged slip and fall.

Worker's Compensation Immunity

Zeeuw v. BFI Waste Systems, 997 So.2d 1218 (Fla. 2d DCA 2008).

Plaintiff's foot was run over by a truck owned by BFI. He filed a negligence action against BFI and summary judgment was granted against

them based upon workers' compensation immunity. It was noted that he previously had worked for BFI on a daily basis as an assigned employee of a staffing company which sometimes supplied labor to BFI. On the day of the accident, the plaintiff believed that he was employed either directly by BFI or by the staffing company and he filed separate petitions for worker's compensation benefits against both, but both denied that he was their employee on the date of the injury.

The plaintiff ultimately dismissed his petition against BFI and settled his worker's compensation claim with the staffing company. As part of the settlement, the parties executed an agreement which acknowledged the staffing company's denial that the parties were in an employer/employee relationship on the date of the accident. BFI's summary judgment was based upon a theory that the plaintiff was a "borrowed employee" under the worker's compensation statute and therefore was entitled to worker's compensation immunity. The Second District found that there were issues of material fact because both BFI and the staffing company disavowed any work relationship in the worker's compensation proceeding. *Cabrera v. T.J. Pavement*, 33 FLW D2680 (Fla. 3d DCA 11/19/08).

The trial court granted summary judgment finding that the defendant was immune from suit based on the worker's compensation immunity. The plaintiff's decedent was killed when a trench he was working on collapsed while installing drainage pipe for the defendant. It was noted that trench protection boxes were available for use by the decedent and his co-workers, however, none had been used. The decedent's estate filed an action against his employer arguing that their conduct "exhibited a deliberate intent to deliver or engage in conduct which was virtually and/or substantially certain to result in injury or death and argued that the claim was supported by citations issued by OSHA finding the employer to have violated regulations governing trenching. They also presented testimony that the conduct of the employer was criminal.

The employer moved for summary judgment based on worker's compensation immunity arguing that 80% of the job had been completed without incident before the decedent's death; no evidence existed that the defendant had previously experienced a trench collapse; and county inspectors were at the site daily and had never requested that trench boxes be used. The trial court denied the motion for summary judgment and then shortly thereafter, the defendant moved for partial summary judgment on the

ground that the criminal acts exception to the worker's compensation laws did not apply to the corporate defendant. The Third District found that the criminal acts exception had no application to the case, but concluded that the OSHA violations supported application of the intentional tort exception to this matter.