2009
CASE LAW SUMMARY

Procedural and Legal Issues

Admission Against Interest

Petit-Dos v. School Board of Broward County, 2 So.3d 1022 (Fla. 4th DCA 2009)

The Fourth District held that the trial court erred in failing to admit statements from the school bus driver who admitted in deposition testimony feeling some responsibility for the accident. The Fourth District found that these were admissions against interest against her employer under F.S. §90.803(18)(d) and should have been admitted, however, the failure to admit the statements were harmless because the jury did assign liability to her employer. For further details about this case, please see the discussion under the Fabre subheading under Procedural and Legal Issues.

Arbitration

Cooper v. Marriott International, 16 So.3d 156 (Fla. 4th DCA 2009)

The parties went to non-binding arbitration. The Plaintiff failed to accept the award from the non-binding arbitration and then lost at trial. Thereafter, the Defendants moved for attorneys fees. The Plaintiff complained that the Defendant never pled its entitlement to attorney's fees by failing to include it in its Answer. After the Defendant's Motion to Tax Fees and Costs, the Defendant sent the Plaintiff a proposed order granting the motion and the Plaintiff never challenged entitlement at that point or when the final judgment was entered awarding attorney's fees and costs. The Fourth District found that the Defendant did not need to plead the right to the attorney's fees and further found that the Plaintiff waived the right to complain about the fees.

Arbitration-Waiver

Sitarik v. JFK Medical Center, 11 So.3d 973 (Fla. 4th DCA 2009)

The Fourth District held that a defendant who actively participated in litigation by filing an answer, affirmative defenses and motions to dismiss and by

issuing subpoenas and propounding discovery waived its right to compel arbitration.

Green Tree Servicing v. McLeod, 15 So.3d 682 (Fla. 2d DCA 2009)

In an en banc decision, the Second District receded from its earlier decision in *Merrill Lynch v. Adams*, 791 So.2d 25 (Fla. 2d DCA 2001) and held that a party's participation in discovery related to the merits of pending litigation is activity that is inconsistent with a demand for arbitration. As such, such activity, considered under the totality of the circumstances, will generally be sufficient to support a finding of a waiver of a party's right to arbitration.

Lynch v. Solid Waste Haulers of Florida, 15 So.3d 919 (Fla. 1st DCA 2009)

A defendant filed a motion to dismiss and a second defendant filed an answer without including a demand for arbitration. The First District held that they did not engage in litigation that would waive their rights to arbitration and therefore from the trial court's order directing the parties to comply with the arbitration agreement.

Attorney's Fees

Rosenberg v. Gaballa, 1 So.3d 1149 (Fla. 4th DCA 2009)

The Fourth District affirmed the trial court's award of attorney's fees against a defendant's counsel under the "Inequitable Conduct Doctrine" as set forth in Moakley v. Smallwood, 826 So.2d 221 (Fla. 2002), finding that the doctrine still permits the trial court to use its inherent power to impose attorney's fees against an attorney for bad faith conduct on issues of discovery and that the doctrine was not made obsolete by Fla. Stat. §57.105.

Pawtucket Mutual Insurance v. Manganelli, 3 So.3d 421 (Fla. 4th DCA 2009)

Plaintiff filed a claim for uninsured motorist benefits. The policy included an arbitration clause which provided that unless both parties agreed otherwise, arbitration would occur in the county where the insured "lives." The insured requested arbitration in Palm Beach County, but the insurer maintained that the insurer lived in New Hampshire because he listed his primary residence there when the policy was issued. The insured brought an action for declaratory judgment and

the trial court determined that Manganelli "lived" in Palm Beach County. The insurance company did not appeal that ruling.

Following arbitration, the insured moved for attorney's fees and costs pursuant to F.S. §627.428 and §627.727(8) arguing that his suit against Pawtucket was only necessary because they effectively denied coverage by refusing to arbitrate in Palm Beach County. The Fourth District upheld the award of attorney's fees even though Pawtucket did not deny coverage pro se, but by maintaining that arbitration had to take place in New Hampshire, it forced its insured to engage in unnecessary litigation.

Amerus Life Insurance Co. v. Lait, 6 So.3d 112 (Fla. 5th DCA 2009)

Following a non-jury trial, a judgment was entered in favor of Amerus. The judgment contained language that the defendant was liable to Amerus for interest, costs and attorney's fees "which are reserved at this time." Eight months later, Amerus moved for entry of an amended final judgment which included a claim for the attorney's fees. The defendant sought to have the judgment for attorney's fees set aside arguing that Rule 1.525 of the Florida Rules of Civil Procedure requires that "any party seeking a judgment taxing costs, attorneys' fees or both shall serve a motion no later than 30 days after filing of the judgment . . ." The Supreme Court held that the 30 day time requirement was inapplicable once the trial court determined entitlement to attorneys' fees and costs.

Anchor Towing, Inc. v. FDOT, 10 So.3d 670 (Fla. 3d DCA 2009)

A party sent a letter to another party demanding that it withdraw certain objections that it had raised and that if the objections were not withdrawn, they would file a motion for attorney's fees under F.S. §57.105. The Third District reversed the administrative law judge's decision to grant the attorney's fees and sanctions holding that F.S. §57.105(4) mandates that "a motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." The court found that the letter citing the statute did not preserve the right to attorney's fees and also found that the party having filed the motion with the court after the proceedings concluded also did not comply with the statute.

Kenniasty v. Bionetics Corporation, 10 So.3d 1183 (Fla. 5th DCA 2009)

Although the cause of action was filed before the safe harbor provisions of Florida Statute §57.105 became effective, the provisions applied because this was a procedural statutory change and not a substantive statutory change. In order to be entitled to attorney's fees under Fla. Stat. §57.105, the moving party must comply with the safe harbor notice which requires that "a motion by a party seeking sanctions . . . must be served but may not be filed . . . unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected."

Cooper v. Marriott International, 16 So.3d 156 (Fla. 4th DCA 2009)

The parties went to non-binding arbitration. The Plaintiff failed to accept the award from the non-binding arbitration and then lost at trial. Thereafter, the Defendants moved for attorneys fees. The Plaintiff complained that the Defendant never pled its entitlement to attorney's fees by failing to include it in its Answer. After the Defendant's Motion to Tax Fees and Costs, the Defendant sent the Plaintiff a proposed order granting the motion and the Plaintiff never challenged entitlement at that point or when the final judgment was entered awarding attorney's fees and costs. The Fourth District found that the Defendant did not need to plead the right to the attorney's fees and further found that the Plaintiff waived the right to complain about the fees.

Abu-Ghazaleh v. Chaul, 34 FLW D2496 (Fla. 3d DCA 12/2/09)

The Defendant was entitled to recover attorney's fees against individuals who were not named as Plaintiffs, but who had financed and had control over the litigation because the unnamed parties' involvement in the litigation was such that their status rose to the level of a party. The Defendant could not; however, recover attorney's fees against the unnamed parties under the Offer of Judgment Statute because the Offer had not been served on the unnamed parties.

Bankruptcy Stays

Puig v. PADC Marketing, 35 FLW D20 (Fla. 3d DCA 12/23/09)

One of several defendants in a case filed for bankruptcy. The trial court granted an automatic stay under 11 U.S.C. Section §362. The Third District found that the trial court departed from the essential requirements of law in granting an

indefinite stay of the entire action against all defendants and that the automatic stay was only operable as to the bankrupt defendant.

Bifurcation

Stanley v. Delta Connection Academy, 12 So.3d 781 (Fla. 5th DCA 2009)

The trial court ordered bifurcation of liability and damages and ordered that the damage portion of the claim be tried first. The Fifth District granted certiorari and found that irreparable injury would be caused which could not be remedied on appeal.

Certiorari

Miller v. Harris, 2 So.3d 1070 (Fla. 2d DCA 2009)

Following an IME, the plaintiff issued a subpoena duces tecum directly to the examining physicians and requested, amongst other things, that the physician provide documents to establish an approximate portion of the doctor's involvement as an expert witness, including percentage of earned income during the last 3 calendar years, copies of all office calendars and schedules which identified all IMEs performed by the doctor performed for insurance companies and/or defense attorneys over the last 3 calendar years, and copies of all reports of these IMEs. The trial court ordered the production of these documents pursuant to the subpoena.

On appeal, the plaintiff conceded that the IME reports of other patients were not properly discoverable. Further, because the defendant agreed that they were obligated to provide answers to interrogatories regarding the expert's involvement in IMEs, the Second District granted certiorari noting that "an expert may be required to produce financial and business records only under the most unusual or compelling circumstances, and may not be compelled to compile or produce non-existent documents."

Stemerman, Lazarus v. Fuerst, 4 So.3d 55 (Fla. 3d DCA 2009)

Denial of a motion to dismiss based upon the expiration of the statute of limitations does not give rise to certiorari review.

Seminole Cas. Ins. Co. v. Mastrominas, 6 So. 3d 1256 (Fla. 2d DCA 2009)

Seminole Insurance Casualty Insurance Company sought certiorari review of a discovery order requiring it to produce certain items in its claims file. The Plaintiff alleged breach of contract and sought a declaratory judgment that coverage was in effect on the date of accident. The lawsuit did not include a claim of bad faith. The Second District held that because the issue of coverage was still in dispute and had yet to be determined, the trial court departed from the essential requirements of law by ordering Seminole to disclose materials in its claims file. Additionally, requiring the disclosure of claims materials during the litigation of coverage issues would result in irreparable harm that could not be adequately addressed on appeal.

In Re: Estate of Trollinger, 9 So.3d 667 (Fla. 2d DCA 2009)

The Plaintiff brought a survival and wrongful death action against the nursing home. The trial court granted the Defendant's Motions to Dismiss pursuant to Florida Statute §400.023(1) which provides that if an action alleges a claim for a violation of a resident's rights or for negligence that caused the death of the resident, the claimant is required to elect either survival damages pursuant to Florida Statute §46.021 or wrongful death damages pursuant to Florida Statute §768.21. The trial court then dismissed the Complaint and ordered Plaintiff to amend the Complaint demonstrating her election of remedies.

The Plaintiff argued that forcing the election of remedies at the pleading stage departed from the essential requirements of law. The Second District did not rule on the actual issue but held that because the Plaintiff could not demonstrate she would be irreparably harmed by electing her remedy at the pleading stage, certiorari was not available.

Dannemann v. Shands Teaching Hospital, 14 So.3d 246 (Fla. 1st DCA 2009)

The Plaintiff moved to prohibit pre-deposition conferences between non-party physicians employed by the University of Florida (also a non-party) and the attorney hired by the Defendant Shands' insurer to represent the physicians at their depositions. The First District determined that the trial court improperly denied the motion and found that Florida Statute §456.057(8) prohibits any non-party physician from disclosing the patient's medical condition and history to counsel hired by the Defendant's insurer to represent the physician at deposition. While

there are situations under which such discussions would be allowed, the First District found that this is not such a case and therefore granted certiorari.

Abbey v. Patrick, 16 So.3d 1051 (Fla. 1st DCA 2009)

The trial court denied defendant's Motion for Summary Judgment on the grounds that the statute of limitations had expired. The First District ruled that such an order is not reviewable by certiorari because any alleged error in the computation of the statute of limitations period would not deprive the defendant of his rights under the medical malpractice pre-suit screening statutes nor was it a violation of clearly established principles of law resulting in a miscarriage of justice.

Stock Development v. Ulrich, 17 So.3d 1233 (Fla. 2d DCA 2009)

At the time that the trial court granted the claim for punitive damages, it had numerous affidavits, depositions, federal trial transcript and the defendants were allowed ample opportunity to respond and present evidence in opposition, including a hearing on the motion. The Second District denied certiorari finding that the scope of reviewing a petition for writ of certiorari to review the granting of a motion to amend the complaint to add a claim for punitive damages is limited to determining whether the Circuit Court adhere to the procedural requirements of F.S. §768.72.

Dr. Navarro's Vein Centre of the Palm Beaches v. Miller, 22 So.3d 776 (Fla. 4th DCA 2009)

The Defendant filed a Petition for Certiorari in order to review an order denying a Motion to Dismiss the Plaintiff's Complaint for non-compliance with the pre-suit screening requirements. The case involved laser hair removal and the Plaintiff alleged that the doctor's negligence in performing the procedure caused severe burns. It specifically alleged that the doctor was not performing medical treatment but was performing cosmetic electrolysis as defined by Florida Statute Section 478.42. The Fourth District granted the Petition and directed the trial court to dismiss the Complaint finding that laser hair removal is a medical procedure because it must be performed by a physician or a non-physician supervised by a physician.

The Fourth District noted that while it did not normally review orders denying motions to dismiss because there are adequate remedies at law in a final

appeal, they found that declining to do so in this case would cause irreparable harm and would vitiate the cost saving pre-trial procedures required under Florida Statute Section 766.106.

Charging Liens

Hall, Lamb & Hall v. Sherlon Investments Corp., 7 So.3d 639 (Fla. 3d DCA 2009)

A law firm's client terminated its services prior to proceeding to mediation with the opposing party. The law firm then notified all of the parties of its charging lien. Thereafter, the parties reached a settlement with the opposing party paying the settlement amount directly to the former client's attorney without notifying the law firm which had filed the charging lien. Thereafter, the law firm was unable to recoup its fee from the former client or its attorney.

The Third District held that the opposing party had an affirmative duty to notify the law firm of the settlement and to protect the firm's interest in the settlement proceeds. They further held that by paying the entire settlement to the former client through its attorney without providing safeguard for the law firm's charging lien, the opposing party may have committed a fraud upon the firm. As such, they concluded that the former client and the attorney may be jointly and severally liable for the charging lien.

Costs

Landmark Winter Park v. Colman, 24 So.3d 787 (Fla. 5th DCA 2009)

Noting that appellate courts had consistently held that certain costs and expenses are not taxable because they are considered overhead (even though the State Uniform Guidelines expressly state that they are only advisory and that the taxation of costs is within the broad discretion of the judge) the Fifth District concluded that it was improper for the trial court to tax overhead costs in the form of postage, on-line research, fax charges, courier charges, photocopies, scanned documents and trial supplies. It was noted that it was also not appropriate to tax costs for parking, overtime, after hours heating and cooling, mileage, meals and long distance phone calls.

Defaults

Lincks v. Keenan, 21 So.3d 184 (Fla. 4th DCA 2009)

The Plaintiff appealed the dismissal of his Fifth Amended Complaint claiming that the court should not have dismissed it when it earlier granted a default against the Defendant. The Fourth District Court affirmed the trial court's dismissal of the Complaint for failure to state a cause of action. Because the entry of a default constitutes an admission of only well pled factual allegations, a complaint which fails to state a cause of action cannot form the basis of a judgment against a Defendant.

Election of Remedies

In Re: Estate of Trollinger, 9 So.3d 667 (Fla. 2d DCA 2009)

The Plaintiff brought a survival and wrongful death action against the nursing home. The trial court granted the Defendant's Motions to Dismiss pursuant to Florida Statute §400.023(1) which provides that if an action alleges a claim for a violation of a resident's rights or for negligence that caused the death of the resident, the claimant is required to elect either survival damages pursuant to Florida Statute §46.021 or wrongful death damages pursuant to Florida Statute §768.21. The trial court then dismissed the Complaint and ordered Plaintiff to amend the Complaint demonstrating her election of remedies.

The Plaintiff argued that forcing the election of remedies at the pleading stage departed from the essential requirements of law. The Second District did not rule on the actual issue but held that because the Plaintiff could not demonstrate she would be irreparably harmed by electing her remedy at the pleading stage, certiorari was not available.

Equitable Subrogation

State Farm v. Johnson, 18 So.3d 1099 (Fla. 2d DCA 2009)

Defendant and State Farm's insured were involved in a motor vehicle accident in June, 2000. In January, 2003, State Farm paid its insured over $40,000 in UM benefits. In October, 2005, State Farm sued the defendant tortfeasor seeking reimbursement for the monies it had paid to its insured. The defendant tortfeasor moved for summary judgment arguing that State Farm's claim was for

contractual subrogation as opposed to equitable subrogation and therefore its claim was barred by the statute of limitations. The trial court granted the motion.

The Second District reversed finding that this was a cause of action for equitable subrogation because State Farm made a payment to protect its own interest; State Farm did not act as a volunteer; State Farm was not primarily liable for the debt; State Farm paid off the entire debt; and subrogation would not work any injustice to the rights of a third party. As such, because State Farm filed its claim within four years of paying the claim, the trial court's summary judgment was reversed.

Evidence of Prior Settlement

Saleeby v. Rocky Elson Construction, 3 So.3d 1078 (Fla. 2009)

The plaintiff was injured when roof trusses on a construction site collapsed and rendered him paraplegic. He collected worker's compensation and then sued the construction company that installed the trusses, as well as the company who manufactured them. Plaintiff settled with the manufacturer and then moved in limine to exclude evidence of the manufacturer's prior status as defendant. The trial court entered an Agreed Order on this. The remaining defendant raised the worker's compensation immunity. Plaintiff sought to show that the collapse resulted from the construction company's failure to follow safety requirements and industry standards in installing trusses.

The defendant sought to impeach the witness who testified that the trusses collapsed as a result of the installation and not from a manufacturing defect. The trial court allowed the defendant to impeach this witness with evidence that the manufacturer had previously been a defendant in the case and then settled. The trial court believed that the evidence went to the witness' bias because it was based on opinions he formulated when the manufacturer was a defendant.

The Fourth District previously ruled that the trial court did not abuse its discretion admitting the evidence because the witness first rendered the opinion when he was a defendant with a pecuniary interest in the case. The Supreme Court reversed and found that the plain language of F.S. §768.041(3) and §90.408 expressly prohibited the admission at trial of any evidence of settlement.

Fabre

Petit-Dos v. School Board of Broward County, 2 So.3d 1022 (Fla. 4th DCA 2009)

A deaf student was injured when, upon exiting a school bus, a pick-up truck struck her as she sought to cross the street. A negligence action was brought against the School Board. The driver of the pick-up truck was fleeing police because he was a suspect in a drug sale. The Fourth District found that the conduct of the driver of the pick-up truck was not intentional and, therefore, the jury could consider his negligence in causing the student's injuries.

Honeywell International, Inc. v. Guilder, 23 So.3d 867 (Fla. 3d DCA 2009)

The Plaintiffs obtained a $24 million dollar verdict for injuries the Plaintiff sustained due to exposure to asbestos. Before trial, the manufacturer unsuccessfully sought to exclude a letter written by an employee of a successor manufacturer. The trial court refused to allow the successor manufacturer to be listed as a *Fabre* defendant even though it may have been relevant to prove the manufacturer's knowledge of the danger of asbestos. The Third District reversed the lower court's decision because the letter contained the following sentence: "My answer to the problem is: if you have enjoyed a good life while working with asbestos products, why not die from it. There's got to be some cause"; finding that this was unfairly prejudicial and should have been redacted.

Forum Non Conveniens

Cooper Tire & Rubber Co. v. Estate of Chavez ex rel. Hernandez, 8 So.3d 1157, 1159 (Fla. 3d DCA 2009)

Venue is not justified in a county simply because a single defendant may reside in that county. In the *Cooper Tire* case, the District Court of Appeal found that the District Court abused its discretion when it failed to transfer the case from Miami-Dade County. In *Cooper Tire*, one of the defendant's principal offices were located in Miami-Dade County. However the accident occurred in Lee County and a majority of the witnesses resided in that county. Focusing on the location of the eyewitnesses to the accident, the District Court of Appeal determined the sparse connections to Miami-Dade County necessitated that case be transferred to Lee County.

Cardelles v. Catholic Health Services, 14 So.3d 1025 (Fla. 4th DCA 2009)

The trial court granted the nursing home's Motion to Transfer Venue based on forum non-conveniens thereby transferring the case from Broward County to Miami-Dade County. The motion asserted that the actions which were the subject of litigation occurred in Miami-Dade County, discovery would take place there, the witnesses were located there and the Broward County resident sued was in his capacity as the administrator of the hospital which ran the nursing in Miami-Dade County.

Because Broward County was a proper venue because one of the Defendants resided there, the Fourth District ruled that the trial court erred in failing to request an affidavit from the Defendants in support of the motion where the Complaint, on its face, did not warrant a transfer for forum non-conveniens.

Hospital Liens

Copeland v. Buswell, 20 So.3d 867 (Fla. 2d DCA 2009)

A wrongful death action was brought. During the pendency of the lawsuit, the hospital where the decedent was treated following the accident filed a statutory lien. Thereafter, without informing the estate and without approval from the probate court, the Defendants reached a settlement with the hospital on the lien paying $300,000 on a claim of $492,224. Although troubled by the Defendants' action, the trial court eventually entered a final judgment awarding only the funeral expenses.

The Second District reversed finding that the Defendants had improperly circumvented the priority of payment of claims set forth in Florida Statute §733.707 (1). Under this statute, the costs and expenses of administration, compensation of personal representatives and their attorney's fees, funeral expenses, debts and taxes all had a priority for payment over the medical expenses incurred during the last 60 days of the decedent's life.

Indemnity

General Asphalt Company, Inc. v. Bob's Barricades, Inc., 22 So.3d 697 (Fla. 3d DCA 2009)

The Third District Court found that a subcontractor, Bob's Barricades and its primary insurer, Lexington Insurance Company who reached a settlement with an injured motorist, did not have a duty to indemnify a general contractor, General Asphalt Company and its primary and excess insurers, including Great American Insurance Company, a $7.25 million dollar settlement that included sums they were seeking in contribution to recover from the subsequent action against Bob's Barricades and Lexington.

The court found that for two reasons no duty to indemnity was owed by the subcontractor and its primary insurer. First, the plaintiff in the underlying complaint, filed separate counts against General Asphalt and Bob's Barricades and did not include a count of vicarious liability of General Asphalt for the alleged negligent actions of Bob's Barricades, which needs to be pled separately, as a matter of law. Secondly, Bob's Barricades' settlement included a release of any party that may be deemed vicariously liable for its own actions that led to the injuries, and therefore they satisfied any duty they would have owed to General Asphalt, even if a duty to indemnify existed.

The contract between General Asphalt and its subcontractor, Bob's Barricades, included a duty to indemnify only for the actions of the subcontractor that led to a claim against the general contractor, and therefore this was completely extinguished when the subcontractor settled and secured the release of any vicariously liable party for its actions and causing the plaintiff's injuries and damages.

Jurisdiction

Vos v. Payen¸ 15 So.3d 734 (Fla. 3d DCA 2009)

The Plaintiff sued a Netherlands corporation which shipped tainted batches of children's fever medicine to Haiti which resulted in the death and illness of numerous children. Because the tainted medicine did not touch or pass through a Florida port, did not involve an intermediate Florida business, or injure a Florida resident, the Third District found that the claim did not relate to or arise out of Florida activity. As such, they concluded that a Florida court could only exercise personal jurisdiction over the defendant if it had regular business contacts with Florida unrelated to the claim.

In this case, the Defendant's sales to Florida corporations during the relevant time period amounted to a fraction of 1% of its total annual sales and; therefore,

were insufficient to support the exercise of jurisdiction by a Florida court. Further, the corporation's correspondent relationship with a Florida bank to facilitate international transfers of money under a letter of credit was also insufficient to establish personal jurisdiction.

Medicare/Medicaid Liens

Smith v. Agency for Health Care Administration, 24 So.3d 590 (Fla. 5th DCA 2009)

The Plaintiff settled a claim for $2,225,000. Thereafter, the Plaintiff sought to reduce the State of Florida's Medicaid lien from $122,784 to $40,928. The trial court denied the motion and the Fifth District affirmed.

In doing so, they note that under Florida Statute §409.910 AHCA could have recovered up to $707,778. Because the state's lien was far less than the statutory cap, the statute allowed the state to recover the full amount of the lien. In doing so, the Fifth District considered the United States Supreme Court decision in *Arkansas Department of Health v. Ahlborn*, 547 U.S. 268 (2006) which mandates a percentage reduction of a Medicaid lien in the same ratio as the settlement bears to actual damages. In this case, the Plaintiff claimed that the settlement represented only 1/3rd the value of the damages. The Fifth District determined that the *Ahlborn* decision was based upon a stipulation between the parties regarding the total amount recovered and the total value of the claim, and because they did not occur in this case, the trial court was affirmed.

Motion for Continuance

Torres v. MK Tours, 10 So.3d 672 (Fla. 3d DCA 2009)

Third District agreed with plaintiff's contention that the trial court erred in denying a motion for continuance on hearing for motion for summary judgment where the defendants provided discovery late and the plaintiffs did not learn until approximately two months before the summary judgment hearing that the defendant had destroyed documentary evidence which allegedly would have been subject to production.

Motion to Dismiss

Zirakzadeh v. Moumina., 6 So.3d 1254 (Fla. 3d DCA 2009)

The Plaintiff filed suit in 2005 but was unable to serve process upon the Defendant. In 2007, the Plaintiff filed a new Complaint alleging the Defendant's negligence and breach of contract. The two Complaints were based upon the same facts. Thereafter, service was completed.

The Plaintiff moved to transfer and consolidate the 2007 action into the 2005 action because of similar facts and allegations. The trial court denied the motion and the Defendant then moved to dismiss the 2007 Complaint. The trial court dismissed the 2007 action with prejudice finding the two actions were duplicitous. The Third District reversed and found that because the trial court's dismissal was not on the merits or as a sanction for inappropriate conduct, the imposition of the dismissal with prejudice was error. It further noted that if the Plaintiff did not dismiss the 2005 action, the trial court would have to consider whether abatement of the 2007 action would be appropriate.

Offer of Judgment/Proposal for Settlement

Central Motor Co. v. Shaw, 3 So.3d 367 (Fla. 3d DCA 2009)

The trial court denied a motion for attorney's fees and costs pursuant to an offer of judgment. The Third District affirmed. Plaintiff filed an unfair trade practice claim against an automobile dealer and the finance company. The dealer filed a proposal for settlement for $1,000. The proposal was not accepted and, a couple of years later, with the knowledge of the dealer, the plaintiff accepted the finance company's offer of $10,000 in exchange for a dismissal of the action against the finance company and the dealer. The dealer moved for attorney's fees and costs. In a 2-to-1 decision, the Third District held that to award attorney's fees in this case would "yield an absurd result."

Cano v. Hyundai Motor America, Inc., 8 So.3d 408 (Fla. 4th DCA 2009)

Husband and wife purchased a Hyundai and subsequently brought a claim for breach of express and implied warranty. Hyundai served a joint proposal for settlement to each plaintiff. The proposal failed to specify the amount and terms attributable to each party. At trial, the jury found in favor of Hyundai and Hyundai subsequently moved for attorney's fees. The Fourth District held that although the

claims of the plaintiffs were indistinguishable as co-owners of the car, the rule governing proposals for settlement was inflexible and applied in all proposals for settlement cases without exception. As such, the failure of the proposals to state an amount and terms attributable to each party rendered it invalid and unenforceable.

Baratta v. Bradford Electric, 9 So.3d 694 (Fla. 4th DCA 2009)

The defendant served a proposal for settlement which was to expire on June 4, 2007. On June 8, 2007, plaintiff's counsel sent a letter to defendant's counsel requesting an additional twenty days to respond to the proposed settlement. Within this time frame, plaintiff's accepted the proposal by letter and further stated "As further consideration for this acceptance, you have advised that your client…will be taking a position if called to testify, that [another defendant] was the negligent party in this accident. You have agreed to make available the people from Bradford Electric that can testify as to that position."

Defense counsel then responded that they could not accept the supplemental terms and insisted on acceptance or rejection of the proposal for settlement as stated. The plaintiff's counsel then accepted the proposal for settlement and plaintiff then subsequently signed released documents. Plaintiff then expressed second thoughts about the settlement and approximately 2½ months after the acceptance of the proposal, plaintiff's counsel sent a letter to defense counsel advising that his client had changed his mind due to evidence that was disclosed during mediation with the remaining defendant. The defendant then moved to compel settlement. The trial court granted the motion and the Fourth District affirmed.

Lorillard Tobacco Company v. French, 12 So.3d 786 (Fla. 3d DCA 2009)

The Defendant appealed an order awarding over 5 years of statutory pre-judgment interest to the attorneys for Plaintiff on an award of fees and costs. The award was based upon a qualifying Proposal for Settlement. The Plaintiff was one of several thousand flight attendants to sue tobacco companies for second hand smoke exposure. Her attorney tendered an Offer of Judgment to settle the claim for $2,600 which was not accepted. The jury awarded the Plaintiff $5,500,000 and, after remittitur, the court entered an amended final judgment in the amount of $500,000. The Defendant argued that pre-judgment interest did not begin until the trial judge entered an order disallowing its objection to the validity of the order; however, the Third District found that pre-judgment interest began to accrue the date of the entitlement to the attorneys fees became fixed through agreement,

arbitration or court determination and found that the qualifying condition occurred when the judgment was recovered.

Harris Specialty Chemicals v. Punto Azul, 12 So.3d 809 (Fla. 3d DCA 2009)

The trial court denied Defendant's Motion for Attorneys Fees finding that the Proposal for Settlement was ambiguous and unenforceable. The Plaintiff contended that the proposal was invalid because it failed to apportion an amount to one of the Defendants. The Third District reversed and found that the settlement proposal was unambiguous adding that a proposal may be made by or to any party or parties or any combination of parties properly identified in the proposal. Further, Rule 1.442 of the Rules of Civil Procedure does 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. Rather, it merely requires that a settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification.

Aleto-Alexander v. Toll Brothers, Inc., 12 So.3d 915 (Fla. 4th DCA 2009)

The plaintiff sued Toll Brothers alleging it was vicariously liable for the actions of its employee, John Barr. John Barr was also a defendant in the action. Toll Brothers served plaintiff with a Proposal for Settlement pursuant to the Offer of Judgment Statute, §768.79, Florida Statutes (2003). The proposal stated that it was being made by Toll Brothers, but provided that the offer was conditioned upon the dismissal of the entire action, including the claims against Barr. The Proposal did <u>not</u> apportion the amount between the claim against Toll Brothers and the claim against Barr. Toll Brothers and Barr prevailed and the case giving rise to the attorney's fees, judgment on appeal.

The appellant argued that the proposal for settlement was unenforceable because it was essentially a joint proposal in light of the fact that it required in exchange for the amount of money, both defendants would be dismissed from the case. The court disagreed and found that despite Florida Rules of Civil Procedure 1.442 which governs proposals for settlement, where it says "a joint proposal shall state the amount in terms attributable to each party" the Supreme Court held that when an offer is made by multiple offerors, it must apportion the amount attributable to each offer in order to support a fee award. The Fourth District found that the fee award was supportable even though it failed to apportion the $5,000 between the two defendants. The offer by the terms of the proposal itself it was being made one of the defendants, and dismissal of the entire suit was simply

a condition of the proposal and did not serve to transform the proposal for settlement to one made by multiple offerors.

Palm Beach Polo Holdings v. Equestrian Club Estates, 21 So.3d 183 (Fla. 4th DCA 2009)

Where a Complaint seeks non-monetary relief, such as a declaration of rights or injunctive relief, the fact that the claim also seeks damages does not bring it within the Offer of Judgment Statute. Therefore, it was error to award attorney's fees pursuant to a Proposal for Settlement where the Proposal applied to an entire case that included both claim for damages and for declaratory relief.

Prejudgment Interest

McCarthy v. Estate of Krohn, 16 So.3d 193 (Fla. 4th DCA 2009)

A law firm was discharged by a client in a personal injury action and then filed a charging lien. Originally, the Plaintiff was responsible for the costs incurred by the firm and these costs were not contingent upon recovery. As the lawsuit continued, the Plaintiff did not have the money to reimburse the firm so the contract was modified to provide that the firm would not seek costs until she obtained a recovery in the case.

The Fourth District ruled that pre-judgment interest on attorney's fees and costs established in a charging lien proceeding runs from the date the client receives the settlement proceeds. Pre-judgment interest on the cost award was to run from the date the case was settled or from the date the client received payment on the settlement. They also held that the law firm was entitled to pre-judgment interest on the attorney's fee award from the date the client received the proceeds of the settlement where the underlying fee agreement made entitlement to attorney's fees contingent on the proceeds of recovery. Lastly, because the attorney's fees were based on *quantum meruit* recovery after being discharged in a contingency fee case, the law firm was entitled to pre-judgment interest on the award set by the court.

Westgate Miami Beach v. Newport Operating Corp., 16 So.3d 855 (Fla. 3d DCA 2009)

In this accounting case, the trial court entered a judgment in favor of the Plaintiff. The Plaintiff was entitled to prejudgment interest, however, because the

amount had not yet been determined, the judgment provided that a separate order would be entered awarding prejudgment interest. Thereafter, the Plaintiff moved to assess the prejudgment interest without challenging or objecting to the final judgment's provision for the award of prejudgment interest by separate order. At a subsequent hearing on the Plaintiff's motion, the trial court stated that it would rule on the issue of prejudgment interest at a later date. Neither party objected or indicated to the trial court that delaying the determination of prejudgment interest might prove problematic. In fact, the record reflects that the lawyers mistakenly believed that the trial court could indefinitely retain jurisdiction to award prejudgment interest once entitlement was established.

Accordingly, without obtaining a ruling as to the amount of prejudgment interest, the Plaintiff filed a Notice of Appeal from the final judgment and the final judgment was affirmed. After the issuance of the Third District's affirmance, the trial court heard the Plaintiff's Motion to Assess Prejudgment Interest. At that hearing, the Defendant argued that because the final judgment affirmed did not contain a liquidated, sum-certain amount of prejudgment interest, the trial court no longer had jurisdiction to award prejudgment interest by way of separate order.

The Third District affirmed the denial of the prejudgment interest based upon the Supreme Court's decision in *McGurn v. Scott*, 596 So.2d 1042 (Fla. 1992) which held that while the trial court may determine the prejudgment interest damages separate from a determination of other damages and enter an interlocutory order setting forth the prejudgment interest to be awarded, the judgment awarding general damages while reserving jurisdiction on the amount of damages in the form of prejudgment interest is not a final order. It further held that when a trial court improperly renders a judgment which appears to be or has the attributes of a final judgment, the order will be deemed to have become a final judgment requiring immediate appeal. Once the appeal is taken, the trial court lacks jurisdiction to take any further action in the matter. Thus, the parties will be deemed to have waived any matter reserved for future adjudication by the trial court with the exception of attorney's fees and costs.

Nova Southeastern University v. Sharick, 21 So.3d 41 (Fla. 3d DCA 2009)

A former student from the College of Osteopathic Medicine brought a claim against the university after he was dismissed from the school two months before he was to receive his degree. The jury awarded past lost earnings and lost future earnings. The Third District ruled that pre-judgment interest was not awardable on a loss of past earnings where the jury failed to fix the date of that loss. Further, it

was error to award pre-judgment interest on the present value of future lost earnings. It was also error to award pre-judgment interest on past and future damages from the date of verdict to the date of final judgment.

Punitive Damages

Cradle to Crayons Childcare v. Ramos, 999 So.2d 1090 (Fla. 1st DCA 2009)

The defendants sought a new trial arguing that the trial court erred in allowing the plaintiffs to amend their complaint to seek punitive damages without complying with F.S. §768.72. The First District ruled that the failure of the trial court to conduct an evidentiary hearing was not fundamental error and the defendant waived their rights under the statute by failing to timely appear and having been previously defaulted.

Leavins v. Crystal, 3 So.3d 1270 (Fla. 1st DCA 2009)

The First District granted certiorari and struck the plaintiff's claim for punitive damages when the plaintiff failed to comply with F.S. §768.72 and Florida Rules of Civil Procedure 1.110 which requires a plaintiff to provide an evidentiary record or proffer which would provide a reasonable basis for recovery of damages.

Stock Development v. Ulrich, 7 So.3d 582 (Fla. 2d DCA 2009)

At the time that the trial court granted the claim for punitive damages, it had numerous affidavits, depositions, federal trial transcript and the defendants were allowed ample opportunity to respond and present evidence in opposition, including a hearing on the motion. The Second District denied certiorari, finding that the scope of reviewing a petition for writ of certiorari to review the granting of a motion to amend the complaint to add a claim for punitive damages is limited to determining whether the Circuit Court adhere to the procedural requirements of F.S. §768.72.

Recusal

Aberdeen Property Owners Ass'n, Inc. v. Bristol Lakes Homeowners Ass'n, 8 So.3d 469 (Fla. 4th DCA 2009)

After the trial court granted plaintiff's motion for summary judgment the defendant moved for reconsideration and rehearing. While the motion was

pending, the defendant moved to disqualify the trial judge noting that they had learned of the trial judge's involvement with a similar dispute with his own homeowner's association. They contended that the judge had a personal bias and prejudice against the homeowner's association with respect to mandatory club memberships given his own involvement in a factually similar dispute. The Fourth District found that the trial court's personal situation supported his disqualification, adding that there was no need for the defendant to show proof of the trial court's actual prejudice, but rather, they only needed to show well founded fear of bias.

Releases

Schatz v. Haslup, 6 So.3d 679 (Fla. 2d DCA 2009)

The Plaintiffs filed an action for medical malpractice and settled with two of the Defendants. The remaining Defendants filed a summary judgment asserting that the Plaintiff's release of claims entered into with the settling Defendants also released them. They also argued that the settling Defendants were initial tortfeasors and that the non-settling parties were subsequent tortfeasors. As such, because the release did not expressly reserve a right to proceed against the subsequent tortfeasors, the non-settling Defendants believed they were entitled to summary judgment.

In response to the motion for summary judgment, the Plaintiffs filed a written irrevocable assignment of rights to them that was signed by the settling Defendants. The Second District found that this irrevocable assignment made it unnecessary to address the issue of the intent of the release and therefore reversed the summary judgment.

Sanctions

Zirakzadeh v. Moumina, 6 So.3d 1254 (Fla. 3d DCA 2009)

Plaintiff's condominium was damaged due to a punctured water pipe. In 2005, the plaintiff filed a lawsuit against the defendant and a number of other defendants but never perfected service upon the defendant. In 2007, the plaintiff filed a new complaint once again alleging the defendant's negligence and breach of contract. The two complaints were essentially based on the same set of facts. The plaintiff was able to serve the defendant with process in the 2007 action. Plaintiff moved to transfer and consolidate the two actions; however, the trial court denied same. The defendant then moved to abate or dismiss the 2007 complaint based

upon the plaintiff's prior motion to transfer and consolidate. The trial court dismissed the 2007 action with prejudice finding that the two actions were duplicitous. The Third District reversed and found that because the trial court's dismissal was not entered on the merits or as a sanction for inappropriate conduct, the imposition of a dismissal with prejudice was error.

Ferdie v. Isaacson, 8 So.3d 1246 (Fla. 4th DCA 2009)

In order to assess attorney's fees and sanctions pursuant to Florida Statute 57.105 against counsel, the trial court must make an express finding that the claim is frivolous and an express finding that the attorney was not acting on a good faith based upon the representation of his client. Because the trial court did not make this express finding, the award against the attorney was reversed.

Campbell v. State of Florida, 9 So.3d 59 (Fla. 1st DCA 2009)

The trial court previously dismissed a class action lawsuit but denied the State's request for sanctions pursuant to Florida Statute 57.105. The plaintiff appealed the dismissal but the State did not cross-appeal the denial of sanctions. After the First District affirmed the trial court's dismissal of the action, the State again requested sanctions against the plaintiff's attorney. Because the State failed to cross-appeal the denial of sanctions, the First District found that the State had waived any right to attorney's fees pursuant to Florida Statute 57.105

Anchor Towing, Inc. v. FDOT, 10 So.3d 670 (Fla. 3d DCA 2009)

A party sent a letter to another party demanding that it withdraw certain objections that it had raised and advised that if the objections were not withdrawn, they would file a motion for attorney's fees under F.S. §57.105. The Third District reversed the administrative law judge's decision to grant attorney's fees and sanctions holding that F.S. §57.105(4) mandates that "a motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." The court found that the letter citing the statute did not preserve the right to attorney's fees and also found that the party having filed the motion with the court after the proceedings concluded also did not comply with the statute.

Kenniasty v. Bionetics Corp., 10 So.3d 1183 (Fla. 5th DCA 2009)

Even though suit was filed before the 2002 amendments to the statute, the motion for attorney's fees and sanctions was filed after the statute's effective date and, therefore, the Safe Harbor provision provided for under Florida Statute 57.105(4) applied. Further, the Fifth District held that moving party did not comply with the Safe Harbor provision because the request to withdraw the claim was done by letter and the Statute specifically provides the Safe Harbor provision is invoked by way of motion.

Williams v. Cadlerock Joint Venture, 14 So.3d 292 (Fla. 4th DCA 2009)

A trial court may properly impose sanctions under 57.105 even though not imposed by the appellate court because no authority exists for an appellate court's imposition of sanctions for conduct occurring in the trial court.

Montgomery v. Larmoyeux, 14 So.3d 1067 (Fla. 4th DCA 2009)

A motion seeking sanctions under Florida Statute 57.105(4) may not be filed with or presented to the court within twenty one days after service of the motion. Even though more than thirty five months passed after the plaintiff received the defendant's motion, the motion was still found to be defective because it had been filed in court less than twenty one days after it was served on the plaintiff.

Settlement

Mercury Insurance Company v. Fonseca, 3 So.3d 415 (Fla. 3d DCA 2009)

In this case, the issue was whether correspondence between Fonseca and the insurance company was sufficient to form a settlement. Following an accident, Fonseca's counsel sent a letter to Mercury stating that "this letter shall serve as a formal demand for a tendering of any and all available policy limits including umbrella coverage."

Two days later Mercury responded, "As requested, this carrier is tendering its bodily injury policy limits . . . also enclosed is a proposed settlement release which is not intended to be a final instrument until you have approved. If you should require any changes or additions, please advise, otherwise, please see that [Fonseca] executes the release . . ."

The Third District noted that the demand letter constituted an offer to settle. Once Fonseca offered to settle, all that was required to form a binding contract was an acceptance. The Third District found that there was an acceptance noting that the requested release did not transform the acceptance into a counter-offer, but rather, "the execution of the release was implicit as part of the tender, and not an additional element of the agreement."

Grant v. Lyon, 17 So.3d 708 (Fla. 4th DCA 2009)

The trial court granted defendant's motion to enforce settlement of a personal injury action because it found that the insurance company for the defendant complied with the policy limit demand of the appellant-plaintiff, however, because the release the insurance company submitted with its payment was not a routine general release, the Fourth District reversed finding that the insurance company had not accepted the demand made by the appellant by adding terms that were not in the demand itself.

The insurance company timely sent their $100,000 policy limits, along with a General Release, Hold Harmless Agreement and Stipulation for Dismissal. The settlement papers also added terms that required the plaintiff to release all potential defendants, as well as warrant that all hospital bills had been paid. There was also a non-disclosure clause that was not agreed to by the plaintiff. In response, appellant's lawyer sent a letter rejecting the counter-offer claiming that because the medical bills were in excess of $250,000, the defendant would have to pay an additional $500,000 before the plaintiff would accept the defendant's offer.

The Fourth District held that the acceptance of an offer which results in a contract for settlement must be absolute and unconditional, and the terms in the acceptance must be to the same matters contained in the offer. Acceptances that add additional terms are legally converted to counter-offers which are subject to being accepted by the party making the initial demand. However, generally an insurance company that accepts an offer can require plaintiff to execute the "usual settlement documents", but where the release contains unusual terms, including that the release releases all persons liable to the plaintiff and not simply the insurance company and its insured, along with a warranty that the hospital bills have been paid and none were outstanding, as well as a confidentiality agreement, are not considered usual and customary settlement terms, and therefore the trial court erred in enforcing the settlement.

Sovereign Immunity

Wallace v. Dean, 3 So.3d 1035 (Fla. 2009)

A daughter was calling her mother's home from outside Florida and was unable to get her mother on the telephone. The woman then contacted her mother's neighbor to check on her mother and the neighbor called 911. Two deputies responded to the call and the neighbor advised them that the woman had diabetes and thought that an ambulance was necessary because the woman was completely unresponsive. The deputies rejected the request assuring the neighbor that the woman was merely sleeping.

When the neighbor returned to check on the woman the following morning, she saw that she had not moved from her position she had been left in. The neighbor then dialed 911 a second time and an ambulance was ultimately dispatched. The woman was transported to a local hospital where she died several days later without ever regaining consciousness. The Supreme Court found that these actions were operational and not of a planning level and therefore, the action was not barred by sovereign immunity. Further, the Supreme Court held that under the "undertaker's doctrine," one who undertakes an action must do so non-negligently applies even to a sovereign.

Splitting Causes of Action

Bryant vs. Tarman, 21 So.3d 137 (Fla. 5th DCA 2009)

The Fifth District found that the trial court did not commit error in rendering summary judgment in favor of defendant when plaintiff impermissively split her cause of action against the defendant. The plaintiff first obtained a judgment for property damage to her motor vehicle, and then filed a lawsuit for personal injuries resulting from the same motor vehicle accident. According to well established law, all damages claimed as a result of a single wrongful act must be sought in one lawsuit, even when it involves a motor vehicle accident. The law does not permit the owner of a single cause of action to divide or split that cause of action so as to make it the subject of several lawsuits. *Mims v. Reid,* 98 So.2d 498, 500 (Fla. 1957).

Statute of Limitations

Ramirez v. McCravy, 4 So.3d 692 (Fla. 3d DCA 2009)

Plaintiff filed his suit three days after the expiration of the four year statute of limitations in a case involving a motor vehicle accident. Plaintiff argued that Florida Supreme Court administrative orders from hurricanes, which were issued after the accident, tolled the statute of limitations on his claim. The last administrative order was more than six months before the statute of limitations expired. Finding that the weather emergencies which gave rise to the administrative orders had nothing to do with the late filing of this action, the Third District upheld the dismissal of the action for failure to bring it within the statutory time limit. The Supreme Court has now accepted jurisdiction of this matter.

Cohen v. Cooper, 20 So.3d 453 (Fla. 4th DCA 2009)

In November, 1997 a doctor performed a face lift. The Plaintiff awoke to excruciating pain in her left eye and also had severe jaw pain. She had additional procedures on her eyelid and testified that in September, 1998, she realized that the doctor "had somehow erred in the procedure on her face." Nevertheless, she also testified that the doctor assured her that this was a "slow recovery process" and that her pain was normal and that "the dents that existed on her face would go away." Because there was conflicting evidence as to when the Plaintiff should have known of a reasonable possibility that her eye pain was as a result of medical negligence and because "simply suspecting wrong doing was not enough", the Fourth District reversed the granting of summary judgment in favor of the Defendant.

Work Product Privilege

Neighborhood Health Partnership, Inc. v. Merkle, 8 So.3d 1180 (Fla. 4th DCA 2009)

In this class action lawsuit against a health maintenance organization (HMO), the Fourth District clarified the limitation of a defendant HMO to hide behind claims of work product doctrine to prevent turning over records in their possession to the class plaintiffs. The Fourth District emphasized that the work product doctrine was created as a *litigation privilege.* It was never meant to apply to ordinary, routine, business-as usual communications. That obviously meant it was not intended to protect the *general* forseeability of being sued in the course of

business – something HMO's routinely face. Therefore, at a minimum, a claim of work product protection requires a *specific* litigation matter can reasonably be anticipated as a result of an occurrence or a circumstance that gives rise to an accrual of a cause of action.

Therefore in this case, documents the HMO prepared in response to requests from the Florida Agency for Healthcare Administration (AHCA) on how its policy or payment of benefits to outside providers reimbursements. The mere fact that the HMO had its counsel review the response to AHCA's request did not cloak it with the work product privilege. There was no specific litigation pending or threatened at that time.

The court reminded that the Florida Supreme Court in *Southern Bell Telephone & Telegraph Company v. Deason,* 632 So.2d 1377 (Fla. 1994) did not stand for a general rule that the mere routine request for information by a regulatory agency justifies presumptive work product protection for any document which the regulated industries company's lawyer had ***cast an eye.***

Rather the Supreme Court in *Deason*¸ held that the protected documents had the following attributes:

a. They were created by the corporation's lawyer for litigation already taking place; or,
b. They were created at the direction of the corporation's lawyer for litigation already taking place; and
c. They were not created and used initially in the ordinary business activities.

As such, the Fourth District Court denied the HMO's Petition for Certiorari and allowed the trial court's ruling to turn over the documents stand.

Workers' Compensation Immunity

Casas v. Siemens Energy, 1 So.3d 294 (Fla. 3d DCA 2009)

The Plaintiff was a machine operator using a mechanical punch press machine. He had been instructed that if a metal lid became stuck in the machine, he should remove it with a long metal rod or with a long screwdriver. While attempting to clear a stuck metal lid, the machine he worked on cycled and crushed his arm. He then sued his employer who claimed workers' compensation

immunity. Plaintiff invoked the intentional tort exception to workers' compensation immunity. The trial court granted summary judgment. Originally, the Third District Court affirmed the trial court in its split decision. The case then went to the Florida Supreme Court which quashed it in light of its decision in Bakerman v. The Bombay Company, 961 So. 2d 259 (Fla. 2007).

On remand, the Third District Court of Appeal found that the lack of safety equipment, as well as the alleged lack of training regarding the operation of the machine raised questions of fact. The Third District also noted that there must be an element of concealment present under the "substantial certainty test" and that the testimony raised was sufficient to proceed.

Adams Homes of Northwest Florida v. Cranfill, 7 So.3d 611 (Fla. 5th DCA 2009)

Adams Homes was constructing a home and employed Seacoast Building Supplies to furnish and deliver roofing materials to the site. Another subcontractor was responsible for actually installing the roof. When Adams Homes needed roofing materials, it would contact Seacoast and order the product. In this case, the plaintiff delivered roofing materials. When he did so, he delivered the products to the roof in accordance with Seacoast's standard operating procedure to "stock the roof out." While doing so, the plaintiff fell through the roof of the home and was seriously injured. Adams Homes asserted that the plaintiff was a statutory employee and, as such, they were entitled to the workers' compensation defense. Trial court found and Fifth District affirmed that the employee was a "materialman" pursuant to F.S. §713.01(20). As such Adams Homes was found not to be entitled to workers' compensation immunity.

C.W. Roberts Contracting, Inc. v. Cuchens, 10 So.3d 667 (Fla. 1st DCA 2009)

The court found that the defendant in a wrongful death suit should have been granted summary judgment based upon the immunity provided under §440.10, Florida Statutes, because the undisputed facts showed that the contractor was a statutory employer of the decedent, and therefore should have been protected by the workers compensation immunity.

The workers comp statute cited above provides that a subcontractor who sublets work to a subcontractor is liable for the payment of all employees workers compensation benefits unless a subcontractor secured compensation coverage on its own. Therefore, the general contractor is a statutory employer and all these

subcontractors' employees cannot be sued unless the employer has committed an intentional tort which caused the injury or death.

Under §440.11(1)(b) the employers' actions shall be deemed to constitute intentional tort and not an accident only when the employee proves by clear and convincing evidence, either that the employer "deliberately intended to injure the employee" or that the employer "engaged in conduct that the employer knew, based on prior similar accidents or explicit warnings, specifically identifying a known danger was virtually certain 6to result in injury or death to the employee", and the employee "was not aware of the risk because the danger was not apparent" and because the employer "deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.

In this case, the plaintiff decedent worked for a subcontractor that hauled asphalt and material from an air force base to a mill pile where the accident took place. The plaintiff's surviving spouse entered into a negotiated settlement of a worker's compensation claim for the death of her husband, and it included a provision that it would represent the set6tlement of all actions that may arise from the accident.

The complaint and evidence lacked the necessary allegations that the general contractor deliberately concealed and misrepresented the danger or that the condition of the mill pile was virtually certain to cause injury or death. Furthermore, there was no evidence that the plaintiff who was hauling the materials away from the job site was unaware of the risk. Therefore, summary judgment should have been granted in favor the general contractor.