2012
CASE LAW SUMMARY

Procedural and Legal Issues

Accord and Satisfaction

Otaola v. Cusano's Italian Bakery, 103 So.3d 993 (Fla. 3d DCA 2012)

The decedent was struck by a Cusano's delivery truck, thereby causing his death. He was survived by his wife and their two children. Shortly after being notified of the claim, Allstate (the primary insurer) tendered its policy limits of $1,000,000. It also disclosed that AIG provided excess coverage for $1,000,000. The adjuster copied AIG on this letter and also noted that, while he did not enclose the release, "I am looking for a general release of the insured parties as provided by F.S. 627.4265. This issue will be addressed once we have reviewed the AIG policy and there has been a determination as to AIG's position with respect to the claim of the estate.…"

Subsequently, the wife and her attorney filed a petition in the probate division of the circuit court for court approval of the $1,000,000 settlement of the minors' claim. The petition represented that the settlement amount would be paid by Cusano's and would be for "the settlement with respect to the minors' claim" and sought authorization for the mother to sign the settlement statement and the release on behalf of her minor children. Following review of the proposed terms and distribution by a court appointed guardian ad litem, the probate judge approved the settlement; however, the order did not mention or provide authorization for execution of any release by the wife, either individually, as personal representative of her late husband's estate, or as guardian of the children. The Third District also noted that no representative or attorney for Cusano's filed a pleading relating to the probate court petition or appeared at the hearing on the petition.

Approximately a year later, after Allstate proceeds had been disbursed in accordance with the order, and with no release being executed by the wife in favor of Allstate or Cusano's, she filed a wrongful death case against Cusano's and Miami-Dade County. In its answer, Cusano's raised the affirmative defense of accord and satisfaction. After two years of pretrial proceedings, the case was set for trial and two months before the trial, Cusano's filed its Motion to Recover Settlement Proceeds or, in the Alternative, to Enforce Settlement. The Plaintiff

opposed it with various affidavits and noted that a release of Cusano's would not be executed until matters were finalized with AIG. The Plaintiff moved for an evidentiary hearing in order to establish the intention of the parties; however, the trial court denied the motion and directed her to either return the $1,000,000 in settlement proceeds or to provide a complete release and dismissal within 30 days. When the Plaintiff did neither, the trial court dismissed the wrongful death suit with prejudice.

The Third District reversed with directions that the insurance proceeds paid by Allstate shall be credited to Cusano's following any subsequent verdict and judgment. In doing so, the Third District noted that Cusano's did not participate in the purported "complete" settlement of all claims before the probate judge. They did not demand a complete release or move to intervene in the probate division to assure that a release would be forthcoming. Additionally, the noted that Cusano's did not plead "settlement" or "release" as an affirmative defense, but instead raised "accord and satisfaction." The Third District noted that, on its face, this was contradicted based upon the fact that Allstate made the payment towards the satisfaction of its liability and Cusano's did not. Further, they noted that "in accord and satisfaction there is proof that 'the parties mutually intend to affect the settlement of an existing dispute by entering into a superseding agreement…'"

Additur

Publix Super Markets v. Worley, 90 So. 3d 859 (Fla. 5th DCA 2012)

The Plaintiff was injured in a slip and fall accident at Publix when he struck his head on the handle of a door of a refrigerated case. The door handle cut the Plaintiff's forehead and he required nine sutures. The jury found that Publix was 100% at fault and awarded the Plaintiff past medical expenses. The jury did not award him anything for future medical expenses, past or future lost wages or past or future non-economic damages. The trial court found that, in light of the jury finding that he was entitled to past medical expenses and that Publix was 100% at fault, an additur of $20,000 for past non-economic damages was appropriate or, alternatively, ordered a new trial. The Plaintiff elected a new trial. The Fifth District found no abuse of discretion on the part of the trial court in its findings and remanded the matter for trial on past non-economic damages.

Arbitration

Steur v. Jaylene, Inc., 105 So. 3d 1278 (Fla. 2012)

The Supreme Court quashed the decision of the Second District Court of Appeal and held that the trial court (as opposed to the arbitrator) must first determine whether an arbitration agreement's limitation on statutory remedies renders the arbitration agreement unenforceable on public policy grounds.

Cox v. Great American Insurance Company, 88 So.3d 1048 (Fla. 4th DCA 2012)

The trial court granted an award of attorney's fees as sanctions under Florida Rule of Civil Procedure 1.730(c). The Fourth District reversed and found that the trial court should have made specific factual findings detailing Cox's breach or failure to perform under the mediation agreement and identify the attorney's fees and costs that Great American incurred as a result of such conduct. Further, the Fourth District reversed and found that it was proper for the trial court to award attorney's fees for litigating the amount of the fee as opposed to just the entitlement to it.

Attorney's Fees

Imseis v. Zaher, 83 So. 3d 1014 (Fla. 2d DCA 2012)

In an action for cancellation of a deed, the trial court reserved jurisdiction to determine entitlement to an award of attorney's fees. Significantly, neither party pled for such relief. The Second District held that a claim for attorney's fees must be pled, whether based on contract or statute. Because neither party pled for such relief, it was error for the trial court to reserve jurisdiction to determine an award of same.

Dickson v. Heaton, 87 So. 3d 81 (Fla. 4th DCA 2012)

In a case arising from a land speculation deal, Plaintiff filed a Complaint and asserted entitlement to attorney's fees under an operating agreement. Plaintiff and the two Defendants, Heaton and Newkirk, were all part of the LLC formed for the deal and subject to the operating agreement. Heaton answered and claimed entitlement to fees only under §608.601(5) Fla. Stat. Newkirk never claimed entitlement in his operative answer but requested fees in two Motions to Dismiss.

Neither were ruled on. Further, in a joint pre-trial stipulation, the parties listed as an issue: whether any of the parties are entitled to reasonable costs and expenses, including attorney's fees.

Plaintiff argued the Defendants had waived entitlement to fees by failing to specifically plead entitlement under the operating agreement. The Fourth District applied the exception in Stockman v. Downs, 573 So. 2d 835 (Fla. 1991), because all parties were aware of the attorney's fee provision in the operating agreement as evidenced by the pretrial stipulation.

Cox v. Great American Insurance Company, 88 So.3d 1048 (Fla. 4th DCA 2012)

The trial court granted an award of attorney's fees as sanctions under Florida Rule of Civil Procedure 1.730(c). The Fourth District reversed and found that the trial court should have made specific factual findings detailing Cox's breach or failure to perform under the mediation agreement and identify the attorney's fees and costs that Great American incurred as a result of such conduct. Further, the Fourth District reversed and found that it was proper for the trial court to award attorney's fees for litigating the amount of the fee as opposed to just the entitlement to it.

USAA Casualty Insurance Co. v. Prime Care Chiropractic Centers, P.A., 93 So. 3d 345 (Fla. 2d DCA 2012)

The Second District held it was an abuse of discretion to apply a contingency fee multiplier in awarding attorney's fees and costs where there was not competent, substantial evidence that Prime Care faced any substantial difficulties in finding competent counsel. Prime Care only set forth testimony from its corporate representative and expert witness. The corporate representative's testimony only established that Prime Care could not secure counsel from three local firms due to a general unwillingness to take the case, not because the relevant market required a multiplier. The Second District did not reach the issue of whether expert testimony alone constitutes sufficient evidence to apply multiplier.

Regions Bank v. Gad, 102 So. 3d 666 (Fla. 1st DCA 2012)

The trial court granted a motion for attorney's fees pursuant to Florida Statute 57.105. The First District reversed the portion of the award directing payment of the fees because it contained no findings of fact.

Robbins v. Rayonier Forest Resources, LP, 102 So. 3d 737 (Fla. 1st DCA 2012)

On a Motion for Attorney's Fees Pursuant to Florida Statute 57.105, the First District held that the moving party failed to comply with the safe harbor provisions of Florida Statute 57.105(4) and, therefore, was not entitled to attorney's fees as a sanction under this provision. The First District added, however, that Florida Statute 57.105(1)(b) authorized the District Court, on its own initiative, to award the prevailing party a reasonable attorney's fee "on any claim or defense at any time during the civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense initially presented to the court … would not be supported by the application of then-existing law to those material facts." As a result, they remanded the matter to the trial court and ordered the losing party to show cause why attorney's fees should not be assessed as a sanction and why any attorney's fees assessed should not be required to be paid solely by the losing party's attorneys.

Vasquez v. First Horizon Home Loans, 37 FLW D2773 (Fla. 3d DCA 12/5/12)

The Third District affirmed the trial court's denial of a claim for attorney's fees because the Appellants did not plead entitlement to the contractual fees asserted and, therefore, waived any such claim.

Certiorari

McEnany v. Ryan, 77 So.3d 921 (Fla. 4th DCA 2012)

The Defendant was involved in a motor vehicle accident on December 17, 2008. The Fourth District held that his treating doctor's medical records from April 23, 2008 and May 1, 2009 were discoverable because it could help to establish whether the Defendant had a current prescription for Ritalin as of the date of the accident. The production of records from dates beyond those visits were "so attenuated from the date of the accident that their disclosure would impinge on [Defendant's] constitutional right of privacy and medical records."

Springhill Health Care Associates, LLC, et al. v. Benlein, 81 So. 3d 624 (Fla. 5th DCA 2012)

It was a departure from the essential requirements of law to order production of documents and answers to interrogatories without first conducting an *in camera* inspection to determine precise nature of ostensibly privileged documents and to further determine applicability of work product and statutory privileges.

State Farm v. Ramirez, 86 So. 3d 1198 (Fla. 3d DCA 2012)

The Third District granted a writ of certiorari to quash an order in an action for a declaration of property insurance benefits and alleging breach of contract. The order compelled the petitioner to produce its entire claim file. The Third District found that the order departed from the essential requirements of law and would cause irreparable harm which could not be remedied on appeal following final judgment.

Publix Super Markets, Inc. v. Anderson, 92 So. 3d 922 (Fla. 4th DCA 2012)

Plaintiffs in a slip and fall case sought "any and all reports concerning the incident identified in the plaintiff's complaint." Publix asserted work product privilege for an incident report and a "customer incident witness statement." The trial court ordered their production and the Fourth District reversed. The Court held that both documents were created after the slip and fall and thus clearly in anticipation of litigation. Plaintiffs did not show that they were unable to obtain the "substantial equivalent of the material by other means," such as depositions.

General Star Indemnity Co., v. Atlantic Hospitality of Florida, LLC., 93 So. 3d 501(Fla. 3d DCA 2012)

The Third District quashed an Order compelling General Star to produce all training manuals, company policy memoranda, and guidelines relating to the underwriting and administration of the subject insurance policies and/or estimating, adjusting and payment of claims under the subject insurance policies. The Court held that these "classic bad faith materials" were not subject to discovery until there had been a resolution of the underlying coverage claim.

Smith v. Eldred, 96 So. 3d 1102 (Fla. 4th DCA 2012)

In this personal injury action, the Plaintiff issued a notice of intent to serve a subpoena and a notice of service of expert witness request for production directed to the Defendant's liability expert. The Defendant objected and argued that Florida Rule of Civil Procedure 1.280(b)(4) does not allow a party to serve a subpoena or a

request for production. In granting the petition for certiorari, the Fourth District stated that the Rule "means what it says and says what it means". As such, the Rule calls for a party to first propound interrogatories and, once disclosed as an expert, the person may be deposed. The scope of employment, compensation, general litigation experience, percentage of worked for plaintiffs or defendants, identity of other cases and an approximation of the expert's involvement as an expert witness "are all fair game"; however, the production of financial and business records may be required "only under the most unusual or compelling circumstances."

James v. Veneziano, 98 So. 3d 697 (Fla. 4th DCA 2012)

The Plaintiff sued the Defendant for a rear-end collision. The Defendant admitted in pretrial interrogatories that she suffered dementia and brain tumors sometime prior to the date of the accident, but he disclaimed any such infirmities at that time. When defense counsel subsequently canceled the scheduled pretrial deposition due to the Defendant presumably suffering a stroke, the Plaintiff moved the trial court to order the Defendant to both answer further interrogatories and to allow the Plaintiff to subpoena medical and other records concerning the Defendant's health. The Defendant objected asserting a right of privacy in the medical records.

The Fourth District quashed the trial court's order and granted certiorari finding that where a party challenges a discovery order concerning material to which he or she asserts a constitutional right to privacy, the trial court must conduct an in-camera examination to determine the relevance of the materials to the issues raised or implicated by the lawsuit.

Board of Trustees v. American Educational Enterprises, LLC, 99 So. 3d 450 (Fla. 2012)

In a dispute over a property acquisition, discovery orders were entered. A Petition for Certiorari was taken to the district court arguing that the discovery orders were overbroad. The Supreme Court held that the district court erred when it quashed the discovery order on the grounds that the underlying order was overbroad without finding irreparable harm. The Supreme Court further held that an order compelling disclosure of financial information is permissible if the information is relevant to disputed issues of the underlying action, even if the information is not admissible at the time of trial.

State Farm v. Aloni, 101 So. 3d 412 (Fla. 4th DCA 2012)

The insured brought a claim against State Farm for roof damage caused by a hurricane. Coverage for the loss was in dispute and had not been resolved. In discovery, the trial court ordered discovery of the insurance company's activity logs, notes, e-mails and photographs contained within their claim file. The Fourth District granted certiorari finding that the trial court departed from the essential requirements of law and caused irreparable injury by allowing this discovery before the coverage issue was resolved.

Steinger, Iscoe and Greene v. GEICO General Insurance Co., 103 So. 3d 200 (Fla. 4th DCA 2012)

In this case, the Steinger Law Firm represented Ms. Washington; a Plaintiff in an uninsured motorist claim against GEICO. During discovery, GEICO propounded standard expert witness interrogatories which the Plaintiff objected to. GEICO filed a motion to compel better answers and, at the hearing on the motion, Plaintiff's counsel admitted that some of the treating physicians would render expert opinions on matters such as causation, permanency and future damages. The trial court then granted the motion. A series of motions and hearings followed which led to GEICO seeking to depose the law firm's office manager in order to obtain information, including documents, relating to the nature and extent of the relationship between the law firm and the treating physicians who the Plaintiff admitted would be rendering expert opinions. All of the requests sought information concerning the financial dealings between the law firm and Plaintiff's healthcare providers including: (1) all record of payments by the firm to the medical providers; (2) all Letters of Protection to those providers; (3) all phone records between the firm and the providers' and (4) all deposition and trial transcripts of the individuals or entities in the firm's possession. The law firm moved for protective order on a variety of grounds. The trial court denied the motion for protective order as to items 1, 2 and 4, but allowed the firm to redact the names of clients in cases that settled or where no lawsuit was filed.

The Fourth District correctly pointed out that the evidence code allows a party to attack a witnesses' credibility based upon bias. They then noted that, for purposes of uncovering bias, there was no meaningful distinction between a treating physician witness who also provides an expert opinion (i.e., a "hybrid witness") and retained experts.

Eventually, they concluded that, where there is a preliminary showing that the Plaintiff was referred to the doctor by the lawyer (whether directly or through a third party) or vice-versa, the Defendant is entitled to discovery information regarding the extent of the relationship between the law firm and the doctor. The Fourth District concluded by noting that they were unable to determine whether GEICO had established the existence of a referral relationship between the healthcare providers and the law firm. At the very least, the healthcare providers must provide financial bias discovery like that permitted by Rule 1.280(b)(5)(A)(iii), as well as, any history of referrals between the healthcare providers and the law firm. Beyond that, if GEICO can establish that the law firm or healthcare providers referred Plaintiff to the other, a more extensive financial bias discovery from both of them may be appropriate.

Conflict Between Affidavit and Deposition

Slominski v. Citizens Property Insurance Corp., 99 So. 3d 973 (Fla. 4th DCA 2012)

Following Hurricane Wilma, the homeowners made minimal repairs to their house costing approximately $1,500; well under their policy's deductible. Three and a half years later, the homeowners filed a claim with Citizens based on wind and water damage. They explained that they waited to file a claim because they originally believed that the damage sustained was below the policy's deductable. Citizens investigated and made a final determination that the damages reported could not be attributed to Hurricane Wilma due to the amount of time that had transpired since the purported date of loss. They also rejected the claim due to the homeowner's failure to comply with post-loss duties which required them to give prompt notice to Citizens. Citizens moved for summary judgment which was granted by the trial court. The Fourth District affirmed the granting of the summary judgment. The Plaintiffs opposed summary judgment by filing the affidavits of various witnesses including the contractor who performed an addition on the home more than 3 years after the hurricane and the engineer who inspected their home at that time. In their affidavits, they opined that the damage to the house was due to Hurricane Wilma. The engineer also opined that there had been no prejudice to Citizens because the causation of the damage would have been the same whether he inspected the property immediately after the hurricane or years later. Citizens filed the deposition of the contractor which was given prior to him filing the affidavit. In the deposition, he testified that he was unable to determine whether the damages were from Hurricane Wilma or a prior hurricane. The Fourth District affirmed the summary judgment citing the often quoted rule that party may

not file his or her own affidavit or that of another which repudiates the prior deposition testimony in order to avoid the entry of a summary judgment.

Continuance

Krock v. Rozinsky and State Farm, 78 So. 3d 38 (Fla. 4th DCA 2012)

Krock brought a personal injury claim arising out of an auto accident against the other driver, Rozinsky, and State Farm for uninsured motorist benefits. Krock denied State Farm's proposal for settlement and recovered less than the proposal at trial. Krock appealed the judgment. The Fourth District affirmed and conditionally granted State Farm's motion for appellate fees to be set by the trial court. Krock was twice granted a continuance of the hearing on attorney's fees. Four days before the scheduled hearing, Krock sent the judge a letter requesting another continuance with a doctor's note stating she was 100% disabled and would never be able to drive again. The court denied the request; stating the letter was *ex-parte* and due to Krock's apparent medical condition, it was unlikely she could ever attend a hearing.

The trial court subsequently entered a final order awarding attorney's fees and costs to State Farm. Krock appealed, contending that the denial of her motion for continuance due to medical issues was an abuse of discretion. In determining whether a denial of continuance is an abuse of discretion, the court will determine: (1) whether the denial creates an injustice for the movant, (2) whether the cause of the request for continuance was unforeseeable by the movant and not the result of dilatory practices, and (3) whether the opposing party would suffer any prejudice or inconvenience as a result of the continuance. Further, when undisputed facts show the physical condition of counsel or a party prevents fair and adequate presentation of a case, the court also considers: (1) the length of the requested continuance, (2) whether the counsel who becomes available for trial has associates adequately prepared to try the case, (3) whether other continuances have been requested and granted, (4) the inconvenience to all involved in the trial, and (5) any other unique circumstances.

Applying those factors, the Fourth District found the trial court did not abuse its discretion in denying the continuance. Krock's ongoing medical condition was foreseeable yet she waited four days before the hearing to make her request. Further, her history of last minute requests allowed the court to conclude that the request was dilatory and only to delay proceedings. Krock made no effort to attend the hearing by telephone or through other means. Finally, given the hearing was to

set attorney's fees, her absence did not prevent a fair and adequate presentation of the case.

Discovery of a Defendant's Medical Records

McEnany v. Ryan, 77 So.3d 921 (Fla. 4th DCA 2012)

The Defendant was involved in a motor vehicle accident on December 17, 2008. The Fourth District held that his treating doctor's medical records from April 23, 2008 and May 1, 2009 were discoverable because it could help to establish whether the Defendant had a current prescription for Ritalin as of the date of the accident. The production of records from dates beyond those visits were "solattenuated from the date of the accident that their disclosure would impinge on [Defendant's] constitutional right of privacy and medical records."

Discovery of Treating Physicians Relationship to Plaintiff's Counsel

Steinger, Iscoe and Greene v. GEICO General Insurance Co., 103 So. 3d 200 (Fla. 4th DCA 2012)

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The Fourth District correctly pointed out that the evidence code allows a party to attack a witnesses' credibility based upon bias. They then noted that, for purposes of uncovering bias, there was no meaningful distinction between a treating physician witness who also provides an expert opinion (i.e., a "hybrid witness") and retained experts.

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Expert Discovery

Smith v. Eldred, 96 So. 3d 1102 (Fla. 4th DCA 2012)

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Fraud on the Court

Chacha v. Transport U.S.A., Inc., 78 So. 3d 727 (Fla. 4th DCA 2012)

Claimant was involved in a 2004 automobile accident. In 2007, he was deposed. During the deposition, he acknowledged that, in 1999, he was injured in an accident at work and suffered head, neck, shoulder, arm and hand injuries. He also testified he did not injure his back in that accident, that he never had back pain as a result of that accident and that, prior to the 2004 car accident, he never complained of back pain. In 2008, he served answers to interrogatories stating that, as a result of the 2004 car accident, he sustained lower back injuries, as well as, neck, head and right knee injuries. In response to a question regarding whether he had previously suffered any injury to those parts of the body for which he was claiming damages, the Plaintiff listed only the injuries to his neck and head that he suffered in the 1999 work accident. The Plaintiff continually reported throughout the litigation that Dr. Ross had treated him for the 1999 and 2004 accidents. The Defendant subpoenaed all of Dr. Ross' medical records and in those records, it revealed that the Plaintiff may have complained about back pain prior to the 2004 car accident. In seven visits prior to the car accident, it was noted that the Plaintiff's lumbosacral spine showed decreased range of motion. In a 2001 visit, the doctor wrote that "the patient remains symptomatically the same with headaches, neck pain, low back and left arm complaints." There were similar notes from prior to the motor vehicle accident.

The Plaintiff ultimately underwent surgery with Dr. Gelbard who related his disc injuries to the 2004 car accident. When confronted with the records which suggested that the back injury may have occurred prior to the car accident, Dr. Gelbard replied that he would have to get more information to determine whether the back injury was a pre-existing condition. The Defendant then filed a Motion to Dismiss for Fraud and the trial court granted it finding that there was clear and convincing evidence that the Plaintiff "committed fraud regarding his medical history and such deception was intended to interfere with the judicial system's ability to impartially adjudicate the case by improperly influencing the trier of fact and unfairly hamper the Defendant's ability to defend the case by intentionally thwarting the discovery process."

The Fourth District reversed and remanded because the order did not include express written findings demonstrating that the trial court had carefully balanced the equities in supporting its conclusion that the Defendant had proven, clearly and

convincingly, that the Plaintiff implemented a deliberate scheme calculated to subvert the judicial process.

Perrine v. Henderson, 85 So. 3d 1210 (Fla. 5th DCA 2012)

The trial court dismissed the Plaintiff's cause of action for fraud on the court. The Fifth District noted that, after two thorough hearings, the trial court had concluded that the Plaintiff made numerous material misrepresentations regarding his medical history and current injuries, therefore, they affirmed.

Suarez v. Benihana National of Florida, 88 So. 3d 349 (Fla. 3d DCA 2012)

The Third District reversed the trial court's order dismissing the action for fraud on the courton the basis of inconsistencies and contradictions in depositions of the Plaintiff in a criminal action against the attackers and in a civil action against the restaurant owner. Although these orders are reviewed using the abuse of discretion standard, the appellate courts also must take into account the heightened standard of clear and convincing evidence upon which an order of dismissal for fraud on the court must be based. Here although there were some inconsistencies between the prior testimony, it did not give rise to the imposition of the most severe sanction of striking a cause of action.

Incomplete Deposition Usage After Witness Dies

Bank of Montreal v. Estate of Antoine, 86 So. 3d 1262 (Fla. 4th DCA 2012)

Jacque Antoine had worked for Harris Bank and, in this capacity, embezzled over $13 million dollars from Bank of Montreal and Harris Bank. Subsequently, he purchased real property in Weston, Florida with money from the same business account that he had used to embezzle the money. He eventually pled guilty to criminal charges that were filed as a result of the embezzlement. The Bank of Montreal and Harris Bank then filed a civil Complaint against Antoine and his wife alleging fraud, constrictive trust, attachment and garnishment. They also sought to impose an equitable lien on the property bought in Weston. While in custody for the criminal charges to which he pleaded, Antoine testified at deposition in connection with the civil litigation. Antoine's wife, who was not involved in the embezzlement, was notified of the deposition and her counsel was present. Antoine admitted to using money from the business account at Harris Bank to buy the property in Weston acknowledging that the funds used to purchase the property were embezzled from the bank. Following this statement, the deposition was

terminated due to the fact that Antoine had chest pains. Seven days later, he died before his deposition could be completed. His estate was substituted as a party and his wife then moved to strike the deposition as being incomplete because she did not have an opportunity to cross-examine him during the deposition. She also moved to strike the plea agreement. The trial court granted these motions and ultimately, entered a directed verdict in favor of the wife.

The Fourth District reversed finding that, even though the wife's attorney did not have an opportunity to cross-examine Antoine, the broad scope of Florida Rule of Civil Procedure 1.330(a) which provides that "at the trial … any part or all of the deposition may be used against any party who is present or represented at the taking of the deposition. Further, subsection (3) provides that the deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is dead. The Fourth District also found that the plea agreement should have been admitted because it was admissible as a declaration against his interest insofar as it related to his diversion of funds to purchase real estate.

Jurisdiction – Corporate Shield Doctrine

Kitroser v. Hurt, 85 So. 3d 1084 (Fla. 3/22/12)

This case arises from a fatal automobile-truck collision. The decedent was killed when an employee of Airgas negligently operated a truck which struck her automobile. The Plaintiff filed an action against Airgas and included five additional Airgas employees as Defendants. The Plaintiff alleged that these individuals were personally responsible for the decedent's death as a result of their personal supervision or training of the Airgas driver. This training occurred in Florida and it was alleged that they knew or should have known that the employee was a careless and dangerous driver. While the employees provided affidavits which indicated that they did not own, lease or rent real estate in Florida, did not have telephone listings in Florida, did not have a post office box, did not own or maintain bank or financial accounts in Florida, did not possess a Florida driver's license, did not own, lease, rent or maintain vehicles, watercraft or aircraft registered in Florida, lacked any professional or vocational licenses in the State of Florida and were not registered voters in Florida; however, the allegations of the amended complaint that each of the employees committed negligent acts while personally present in Florida were not controverted. The Florida Supreme Court held that these non-resident Defendants were subject to jurisdiction in Florida under the Long-Arm Statute. They held that, where an individual, non-resident

Defendant commits a negligent act in Florida, whether on behalf of a corporate employer or not, the Corporate Shield Doctrine did not operate as a bar to personal jurisdiction over the individuals Defendant.

Mediation/Sanctions

Cox v. Great American Insurance Company, 88 So. 3d 1048 (Fla. 4th DCA 2012)

The trial court granted an award of attorney's fees as sanctions under Florida Rule of Civil Procedure 1.730(c). The Fourth District reversed and found that the trial court should have made specific factual findings detailing Cox's breach or failure to perform under the mediation agreement and identify the attorney's fees and costs that Great American incurred as a result of such conduct. Further, the Fourth District reversed and found that it was proper for the trial court to award attorney's fees for litigating the amount of the fee as opposed to just the entitlement to it.

Carden and Associates v. C.O.D. Trees Partnership, 83 So. 3d 862 (Fla. 5th DCA 2012)

The Fifth District ordered appellate mediation in this matter. Appellate Rule 9.720(b) which governs appellate mediations provides that the court may impose sanctions against a party who fails to appear at a mediation conference without good cause. The rule further provides that, unless changed by order of the court, a party is deemed to appear at a mediation conference if certain persons are physically present, including "the party or its representative," the party's "counsel of record," and "a representative of the insurance carrier for an insured party." In this case, neither of the appellants appeared at the mediation, but rather, only their insurance company representative and an attorney appeared. No motion was filed with the court seeking to excuse the personal appearance of the appellants. As such, the Fifth District granted the motion for sanctions and ordered them to pay all fees charged by the mediator and all of C.O.D.'s reasonable costs and attorney's fees incurred in preparing for and attending the mediation, as well as for filing the motion for sanctions.

Medicaid Liens

Garcon v. A.H.C.A., 96 So. 3d 472 (Fla. 3d DCA 2012)

The patient suffered a devastating gunshot injury which rendered him totally and permanently disabled. Medicaid expended $244,590.57 for his past medical expenses. He then received a $1,000,000 settlement from a tortfeasor which was stipulated to represent compensation only for past and future medical expenses and nothing for any intangible elements of damages for which Medicaid would not have been entitled to reimbursement. The issue involved the extent of Medicaid's lien on the settlement.

The Third District held that, pursuant to Florida Statute 409.910, Medicaid was entitled to be reimbursed the full amount of its lien. The Plaintiff argued that the case of *Arkansas Department of Health and Human Services v. Ahlborn,* 547 U.S. 268 (2006) preempted the statute and obliged the trial court to "allocate" any settlement based upon a "fair evaluation" of the Plaintiff's injuries which his expert testified would be over $8,000,000 between past and unreimburseable future Medicaid payments in between medical expenses and intangibles. The Third District disagreed and noted that *Ahlborn* struck down an Arkansas statute to the extent that it allowed for Medicaid recovery that could impinge on an entire Plaintiff's award and not merely past medical damages for which Medicaid may be reimbursed. Further, *Ahlborn* specifically recognized that even when a settlement is not allocated entirely to a recovery amount representing medical damages, the State was free to adopt "special rules and procedures" to fix the lien. Florida Statute 409.910 represented such a "special rule."

Roberts v. Albertson's, Inc., 37 FLW D2515 (Fla. 4th DCA 10/24/12)

The Plaintiff was involved in an accident in which he was rendered quadriplegic. Medicaid paid for all of the medical care associated with the accident which totaled $343,453. The Plaintiff brought actions against four Defendants. Three of them settled for policy limits and another one paid $2,735,000. This last Defendant provided a settlement agreement which did not contain any allocation between medical expenses, economic losses or non-economic losses. Prior to reaching the settlement, AHCA filed a lien against the third party benefits paid in settlement by the tortfeasors. AHCA did not participate in the settlement agreement. Thereafter, the Plaintiff filed a motion to determine an equitable Medicaid lien amount asking the court to determine the amount of the settlement that was comprised of medical expenses and to limit recoupment of the

Medicaid lien to that amount. The Plaintiff claimed that the true value of damages was $44.8 million dollars and his expert submitted an affidavit claiming economic damages totaling $11.8 million dollars, past non-economic damages in the amount of $8 million dollars and future non-economic damages of $25 million dollars. AHCA filed a response opposing the hearing because Florida Statute 409.910(11)(f) provides a statutory formula to determine what portion of the personal injury settlement is subject to Medicaid lien. Contrary to the decisions of the Third District in *Garcon v. AHCA*, 96 So.3d 472 (Fla. 3d DCA 2012) and *Russell v. AHCA*, 23 So. 2nd 1266 (Fla. 2d DCA 2010) and in accordance with the Fifth District decision in *Smith v. AHCA*, 24 So. 3d 590 (Fla. 5th DCA 2009), the Fourth District held that a Plaintiff should be afforded an opportunity to seek the reduction of a Medicaid lien amount by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses. The Fourth District then certified conflict with *Garcon* and *Russell.*

Offer of Judgment/Proposal for Settlement

Winter Park Imports v. JM Family Enterprises, 77 So. 3d 227 (Fla. 5th DCA 2012)

In a claim where the Plaintiff seeks both monetary damages and injunctive relief as part of the same claims, Florida Statute 768.79 does not apply and, therefore, a Proposal for Settlement filed under this statute is invalid.

Kadlecik v . Haim, 79 So.3d 892 (Fla. 5th DCA 2012)

The Defendant filed a Proposal for Settlement in this wrongful death action. Ultimately, the Defendant prevailed and the Fifth District held that they were entitled to recover fees from the estate based upon the Personal Representative's rejection of a reasonable offer of settlement, but the fees could not be recovered from the settlement funds allocated to the survivor under the Wrongful Death Act. As such, they held that the trial court erred in requiring the Personal Representative to pay the Defendants' attorneys' fee claim before distributing settlement proceeds to himself as a sole survivor. They noted that even though the Personal Representative was the sole survivor, this did not change the result.

Lastly, they held that even though Florida Statute §768.26 allows for the deduction of litigation expenses from awards made to survivors, this applies only to the fees and costs incurred by the attorneys representing the survivors, not the attorneys representing the Defendants' actions against the survivors.

McGregor v. Molnar, 79 So. 3d 908 (Fla. 2d DCA 2012)

Plaintiff filed a Proposal for Settlement which offered to settle the claim against the negligent tortfeasor, but reserved Plaintiff's right to proceed against the vicariously liable tortfeasor. Ultimately, the Plaintiff prevailed on the Proposal for Settlement, but the trial court denied the award of attorney's fees finding that the Proposal for Settlement which reserved the right to proceed against the vicariously liable tortfeasor was not made in good faith because it did not conclude litigation. Further, the trial court found that the offer was not made in good faith because, if accepted, it would merely provide funds for the Plaintiff to proceed with litigation. The Second District ruled that securing funding to further prosecute a case is a valid strategic reason for filing a Proposal for Settlement. Lastly, the fact that the Defendant's failure to accept the Offer caused no additional delay or litigation costs is not a proper factor to be considered in determining good faith.

Southeast Floating Docks, Inc. v. Auto-Owners Insurance Company, 82 So. 3d 73 (Fla. 2012)

The Florida Supreme Court found that Florida Statute 768.79 created a substantive right to costs and fees upon the satisfaction of certain conditions. In this case, the parties had agreed to be bound by the substantive law of another jurisdiction and, therefore, found that Florida Statute 768.79 did not apply to this cause of action.

Ziadie v. Feldbaum, 84 So. 3d 435 (Fla. 4th DCA 2012)

The Defendants filed a Proposal for Settlement in which they offered to pay $1,000 conditioned upon the Plaintiffs signing releases, indemnity agreements and confidentiality agreements. None of the agreements were attached to the proposals, nor were their terms included in the proposal. The Defendants prevailed at trial and then they moved for attorney's fees which the trial court granted.

The Fourth District reversed finding that the Proposals for Settlement did not comply with Florida Rule of Civil Procedure 1.442 adding that "without the attachment of the agreements for release, indemnity and contribution, or an inclusion of their terms in the Proposals for Settlement, the proposals did not satisfy the particularity requirement of Rule 1.442(c)(2) which requires the settlement proposals to state with particularity any relevant conditions of monetary terms."

Duplantis v. Brock Specialty Services, 85 So. 3d 1206 (Fla. 5th DCA 2012)

Duplantis was injured when his vehicle was struck by a pick-up truck driven by Anthony Russo. The truck was owned by the Donlen Trust which leased it to Brock Enterprises Texas which, in turn, assigned to its wholly owned subsidiary, Brock Specialty Services Ltd. Duplantis brought suit against Russo for his negligent operation of the vehicle and against the Donlen Trust and Brock Specialty as owners vicariously liable for Russo's negligent operation. Duplantis further alleged that Brock Specialty, as Russo's employer, was vicariously liable for his actions. Brock Specialty served an Offer of Judgment upon Duplantis in settlement of any and all claims against it, but conditioned the settlement on execution of a release in favor of all named Defendants, as well as, their affiliates. A copy of the proposed release was attached to the offer. The verdict was substantially less than the Offer of Judgment and Russo, Brock Enterprises and Brock Specialty then moved for an award of attorney's fees and costs. On appeal, the Plaintiff argued that the joint proposal was invalid because it failed to state the amount and terms attributable to each Defendant based upon *Lamb v. Matetschk*, 906 So. 2d 1037, 1042 (Fla. 2005) in which the Supreme Court held that an Offer of Judgment must apportion the offer among the parties, even when one party's liability is purely vicarious.

The Fifth District noted that they had previously approved a joint Offer of Judgment made by two Defendants to a single Plaintiff which was conditioned on the dismissal of a Defendant who was not an offeror in *Andrews v. Frey*, 66 So. 3d 376 (Fla. 5th DCA 2011). The Fifth District noted; however, that in *Andrews*, vicarious liability was not disputed. In this case, vicarious liability was contested by the offeror until trial began. As such, the Fifth District held that the Plaintiff was entitled to separate Offers from each Defendant.

Pratt v. Weiss, 92 So. 3d 851 (Fla. 4th DCA 2012)

The Plaintiff filed a medical malpractice action against FMC Hospital Ltd., a Florida limited partnership d/b/a Florida Medical Center and FMC Medical, Inc. d/b/a Florida Medical Center. The Complaint alleged that the two entities owned, operated, maintained and controlled Florida Medical Center and also alleged that FMC Hospital Ltd. was a limited partnership and that FMC Medical, Inc. was a general partner of Florida Medical Center. The Complaint alleged claims of negligent hiring/retention and vicarious liability for the negligence of two doctors against each of these corporate Defendants. While the Complaint named two hospital entities as Defendants, each was alleged to be responsible for the

negligence of a single entity; Florida Medical Center. Both of the corporate Defendants filed a singular Proposal for Settlement which required the Plaintiff to sign a full and complete General Release and Hold Harmless Agreement. The body of the Proposal stated that it would resolve "pending matters between the Plaintiff and the named Defendants"; however, the attached settlement agreement required the Plaintiff to release "any agents" of the two hospital Defendants.

At trial, the Plaintiff and FMC Hospital Ltd. entered into a joint stipulation that FMC Hospital Ltd. was the proper party in interest. The stipulation was not in existence when the Defendants made the Proposal. Post-trial, the trial court concluded that the Proposal was enforceable because it had made by a similar entity, the hospital, and was unambiguous.

The Fourth District upheld the trial court's finding that the offer was made on behalf of a single hospital entity even though the release referred to two companies that owned, controlled or maintained the hospital. It should be noted that these two corporate Defendants were treated as a single entity during the litigation. They were represented by the same lawyer, filed a single Answer and were listed as one on the verdict form. The Fourth District noted that the singular nature of the entity was most evident in the parties' ultimate agreement that FMC Hospital Ltd. was the only proper Defendant. The Plaintiff also argued that the release was ambiguous because it required the Plaintiff to release the hospital's agents and the Complaint alleged that two physicians were agents of the hospital. The Fourth District disagreed and stated that acceptance would not have released the other named Defendants because the language of the release provided only for the release of unnamed agents of the hospital.

R.T.G. Furniture Corp., v. Coates, 93 So. 3d 1151 (Fla. 4th DCA 2012)

RTG Furniture appealed a denial its motion for entitlement to attorney's fees pursuant to a proposal for settlement submitted to Coates on the basis that the proposal was one day late under Fla. R. Civ. P. 1.442. Coates filed an action against the corporation for negligence and loss of consortium. RTG served a proposal for settlement, which was denied. The trial court entered judgment in favor of RTG. RTG filed a motion for entitlement to attorney's fees and costs. The Fourth District held that the trial court erred in denying the motion. The proposal for settlement was timely served 45 days before the date set for trial within the meaning of Rule 1.442(b).

Because the proposal was required to be served 45 days before the date set for trial, the proper method for counting the 45 days was to include the day the proposal for settlement was served and to exclude the date set for trial. January 28 was 45 days before the date set for trial within the meaning of Rule 1.442(b), and the corporation timely served the proposal on January 28. The plain and ordinary meaning of Rule 1.442(b) was that the deadline for serving a proposal for settlement was the 45th day before the date set for trial. In other words, the 45 days included the date of service of the proposal for settlement but did not include the trial date. The court of appeal reversed the denial of the corporation's motion for entitlement to attorney's fees.

Estilien v. Dyda, 93 So. 3d 1186 (Fla. 4th DCA 2012)

In a personal injury case, the trial court granted attorney's fees and costs to Dyda because Estilien rejected an offer of settlement under §768.79(6)(b), Fla. Stat. (2012). The trial court then ordered production of Estilien's billing records in order for Dyda to calculate his time because Dyda "worked on contingency fee basis and did not keep time records." The Fourth District reversed, holding that where billing records of opposing counsel are sought solely for the purpose of supporting a claim for attorney's fees, the party seeking production must establish that the materials are relevant to a disputed issue, the records are needed to prepare for the attorney's fee hearing, and that substantially equivalent material cannot be obtained from another source. The Court reasoned that because there can be substantial difference between the time spent in a case by counsel on each side. Therefore, the time spent by Estilien is not relevant to calculating the time spent by Dyda.

Lyons v. Chamoun, 96 So. 3d 456 (Fla. 4th DCA 2012*)*

The Plaintiff filed a Proposal for Settlement in which he offered to accept $40,000 to settle this matter and, in return, execute a full release of liability. The Plaintiff did not attach a release or describe its terms. The Fourth District found that the failure to attach the release or sufficiently describe its terms rendered the proposal ambiguous and reversed the award of attorney's fees.

Blanton v. Godwin, 98 So. 3d 609 (Fla. 2d DCA 2012)

The Second District concluded that the trial court erred in awarding attorney's fees for consortium claim because the evidence did not establish that the fees awarded were solely related to the work done on that claim. Due to a proposal

for settlement made, the trial court ordered Blanton to pay attorney's fees specifically attributable to the loss of consortium claim. In determining the time spent on the consortium claim, Godwin argued that it was entitled to 100% of all attorneys fees because the personal injury and consortium claim were inextricably intertwined. Alternatively, Godwin presented an expert who estimated, based on anecdotal evidence, that 35% of total time expended on case was for consortium claim. Blanton's expert found only 3.3 hours related to the consortium claim in Godwin's billing. The trial court determined that 25% of total time was related to consortium claim.

The Second District noted that the party seeking fees has the burden to allocate them to the issues for which fees are awardable or to show that the issues are so intertwined that allocation is not feasible. Godwin's argument that some attorney's do not take copious notes did not meet this burden. Further, the Court declined to adopt his blanket rule that consortium claims are always so intertwined with the spouse's claim that allocation is never possible.

Arnold v. Audiffred, 98 So. 3d 746 (Fla. 1st DCA 2012)

The Plaintiff, Audiffred, and her husband (Kimmons) were struck by a vehicle driven by Mr. Arnold. Ms. Audiffred filed a Proposal for Settlement. The Proposal was to resolve "any and all claims Plaintiffs have brought against the Defendants set forth in the Complaint …" She added that "both Plaintiffs will dismiss this lawsuit, with prejudice, as to the Defendant. She then stated that the total amount of the Proposal was $17,500. At the end of the trial, the jury awarded Audiffred $26,055, but did not award anything to her husband for loss of consortium. The trial court granted the motion for fees pursuant to the Proposal. The First District reversed and found that, when the Proposal was read as a whole, it was a joint proposal and therefore the damages needed to be apportioned between the offerors.

Saunders v. Dickens, 103 So. 3d 871 (Fla. 4th DCA 2012)

Following a defense verdict, the Defendant moved for attorney's fees against the husband and wife. The trial court entered an attorney's fee judgment jointly and severally against both Plaintiffs. The Fourth District reversed for an evidentiary hearing so that the trial court may determine which hours were specifically related to the consortium claim and which hours were related to the personal injury claim. The Fourth District noted that the burden is on the moving

party to allocate the fees between the claims or to show that the issues were so intertwined that allocation is not feasible.

Braaksma v. Pratt, 103 So. 3d 913 (Fla. 2d DCA 2012)

The Plaintiff filed an Offer of Judgment for $50,000. The Defendant rejected the offer and a judgment was ultimately entered in the amount of $293,939. The Plaintiff then filed a timely motion seeking attorney's fees and costs. At the hearing on the motion, the Defendant did not contest that the Plaintiff was entitled to attorney's fees under the Offer of Judgment, but argued that it would be reasonable to award no attorney's fees because the Defendant's rejection of the Offer did not result in any additional delay causing expenses to the Plaintiff. They explained that due to the Plaintiff's failure to serve an Offer of Judgment on the co-Defendant, the Plaintiff would have been required to proceed to trial on the vicarious liability claim even if the Defendant had accepted the Offer of Judgment.

The trial court agreed with this and the Second District reversed finding that where a Plaintiff obtains a qualifying judgment under the Offer of Judgment statute and the Offer of Judgment complies with the technical requirements of the statute, it was error to decline to award any attorney's fees on the ground that Defendant's rejection of the Order did not result in any additional costs or expense to the Plaintiff. They further added that, once a trial court determines that a party had complied with the technical requirements of the statute and rule governing officers of judgment, the trial court can only disallow fees upon a finding that the offer was not made in good faith.

General Mechanical Corporation v. Williams, 103 So. 3d 974 *(Fla. 1st DCA 2012)*

The Defendant filed a nominal Offer of Settlement for $1.00. Following a verdict in favor of the Defendant, it moved for attorney's fees and the trial court denied the Defendant's motion based upon a finding that the nominal offer was not made in good faith. In reversing the trial court's decision, the First District noted that in cases where only a nominal offer is made, a reasonable basis exists only where the undisputed record strongly indicates that the Defendant had no exposure. In this case, a review of the record strongly indicated that the Defendant had no exposure to liability.

Delmonico v. Crespo, 37 FLW D2786 (Fla. 4th DCA 12/5/12)

The Plaintiff filed a defamation action and the Defendant served an Offer of Judgment and moved for attorney's fees. The Defendant sought $983,981 for 2,382 hours of attorney and paralegal time and also sought $75,533 for routine expense items including postage, photocopies, tolls, facsimiles, couriers, express mail, computerized research, hotels during trial, working meals, parking fees, mileage, CPA forensic accounting fees and jury selection consultant fees. After an evidentiary hearing, the trial court found that the reasonable number of attorney hours (including paralegals) was between 1,800-1,900 hours for an award of $830,250. As for the request for expenses, the trial court found that many of the expenses constituted normal overhead; however, the court reasoned that section768.79 is in the form of a sanction and, therefore, the court allowed a portion of expenses to be recovered for a total of $25,000 to compensate the Defendant in part for items such as jury selection consultant and the forensic accounting fees.

The Fourth District reversed finding that the order awarding attorney's fees was fundamentally erroneous because the trial court failed to make specific findings as to an hourly rate, the number of hours reasonably expended and the appropriateness of reduction or enhancement factors. The Fourth District also held that the forensic accounting fee should not have been awarded because these were consulting experts and not testifying experts and, furthermore, ruled that jury consultant fees are not recoverable.

Recusal

Block v. Searcy, Denney, et al, 85 So. 3d 1122 (Fla. 1st DCA 2012)

The First District reversed a non-final order compelling arbitration because the order compelling arbitration was entered on the same day that the trial court entered an order of recusal. The First District held that an order entered simultaneously with a recusal order is void because it was not clear which order was signed or filed first.

Remittitur

RJ Reynolds Tobacco v. Townsend, 90 So. 3d 307 (Fla. 1st DCA 2012)

In a wrongful death suit against the tobacco companies, the jury awarded $10.8 million dollars in compensatory damages and $40.8 million dollars in punitive damages. The First District found that the trial court did not abuse its discretion in failing to remit the compensatory damage award because there was a proper evidentiary basis to justify the award and, despite its size, the award was not based solely on passion or prejudice.

As for the punitive damage award of $40.8 million dollars, the First District noted that the reprehensibility and wantonness of the Defendant's conduct was substantial, nevertheless, this award was constitutionally excessive in view of the substantial compensatory damage award. They remanded the case for the limited purpose of permitting the Defendant to choose between a new trial solely to determine punitive damages or to accept a remittitur judgment on the punitive damage award to be established by the trial court.

Azoulay v. Condominium Association of La Mer Estates, Inc., 94 So. 3d 686 (Fla. 4th DCA 2012)

In a trip and fall case, the jury awarded $300,000 for past and future pain and suffering and, post-verdict, the trial court remitted the non-economic damage to $150,000. The Fourth District upheld noting that in the entire trial there were only two pages of testimony concerning the Plaintiff's injuries. There were no doctors called and all the Plaintiff testified to was that she was in a temporary cast, had surgery on her wrist and, at the time of trial, her wrist continued to hurt. She also testified that she had difficulty doing some tasks such as cutting fruits and vegetables. Applying the criteria set forth in Florida Statute 768.74, the Fourth District found that the trial court did not abuse its discretion in remitting the non-economic damages.

GEICO Indemnity Company v. DeGrandchamp, 102 So. 3d 685 (Fla. 2d DCA 2012)

A jury returned a verdict awarding the Plaintiff $1,250,000 in future medical expenses reduced to a present money value of $250,000. GEICO, the uninsured motorist carrier, filed a motion for remittitur challenging the award which the trial court denied. The Second District reversed with instructions to enter an order of

remittitur or alternatively enter an order granting a new trial on the issue of damages for future medical expenses. In so doing, they noted the oft cited rule that where a Plaintiff seeks damages for future medical expenses, only medical expenses that are reasonably certain to be incurred in the future are recoverable and there must be an evidentiary basis upon which the jury can, with reasonable certainty, determine the amount of those expenses.

The Second District noted that the Plaintiff established that she was reasonably certain to incur at least some medical expenses in the future; however, they found there was no evidentiary basis to support the amount of the award. Specifically, an interventional radiologist testified that it was reasonably certain that the Plaintiff would continue to experience problems with her neck in the future and that "for a patient like this, if they continue to have symptoms … I would probably consider doing a nerve root block" and then he testified that such patients initially get two rounds of blocks consisting of six shots and that hopefully after that they are satisfied with the level of pain relief, but that "some patients come back every year for one or two more injections, or every other year." When the interventional radiologist was asked what the Plaintiff's future course of treatment would be within a reasonable degree of medical probability, he did not testify that she required any treatment, but instead reiterated his testimony of the patients who have had the same type of surgery can continue to experience neck problems.

The second physician who had testified regarding future medical treatment, stated that it was reasonably certain that she would need some treatment for her neck the rest of her life including physical therapy, "probably injections" and "possibly surgery." This physician testified that there was a "good chance" that the Plaintiff would need surgery in the future at a cost of $50,000-$60,000, but was unable to testify regarding the cost of anything other than the surgery.

Sanctions

Young v. USAA Casualty Insurance Company, 80 So. 3d 1147 (Fla. 4th DCA 2012)

Even though the trial court entered an order with details surrounding the Plaintiff's failure to comply with court orders and attend depositions, the order granting dismissal with prejudice was reversed because it failed to contain an explicit finding of willful non-compliance.

Alsina v. Gonzalez, 83 So. 3d 962 (Fla. 4th DCA 2012*)*

The trial court dismissed Plaintiff's cause of action due to their attorney's repeated failure to attend calendar calls and comply with court orders regarding attendance at same. Based upon the striking of the pleadings, the court then entered summary judgment on various counterclaims. Although dismissal of a complaint for non-compliance with a court order is subject to an abuse of discretion standard of review, where the trial court fails to apply the standards for the sanction of dismissal as set forth in *Kozel v. Ostendorf*, this is itself a basis for reversal and remand for application of those standards. Further, even though there was no transcript of the hearing where the factors may have been considered, the Appellate Court would not affirm the trial court because the order dismissing the action was completely devoid of any consideration of the six factors set forth in *Kozel*.

Cox v. Great American Insurance, 88 So. 3d 1048 (Fla. 4th DCA 2012)

The Appellant was sanctioned for failure to comply with the mediation agreement pursuant to Florida Rule of Civil Procedure 1.730. The Fourth District reversed the order; however, because the trial court did not make specific factual findings detailing the Appellant's breach or failure to perform under the mediation agreement or in identifying the attorney's fees and costs that the Appellee incurred as a result of such conduct.

Mount Sinai Medical Center v. Gonzalez, 98 So. 3d 1198 (Fla. 3d DCA 2012)

The Plaintiff claims that as she and her husband walked down the steps at the hospital, her husband fell and broke his hip and, as a result, he passed away a few weeks later. In evaluating the evidence, the Third District reversed and ordered that a verdict be entered in favor of the hospital because the Plaintiff did not present competent evidence that her husband even fell on or down the steps, let alone that he did so because of a defective condition. Further, the Third District noted that even if a directed verdict was not warranted, a new trial was required because the trial court erroneously admitted unsupported expert testimony. Specifically, while they found that the expert's testimony was arguably sufficient as to whether the steps were properly constructed; however, his testimony in the key issue of causation was not only "well beyond the witness's supposed expertise, but totally 'conclusory in nature and … unsupported by any discernable, factually-based chain of underlying reasoning.'"

Secondly, a new trial would have also been required because the trial court erred in admitting evidence of a prior slip and fall at the scene which was not similar to the one in question. The ruling was made as a purported "sanction" for an alleged discovery violation; however, the court questioned whether a harmful violation occurred at all and added that "even if it did, there was no justification - - and we have found no authority to support - - the admission of concededly otherwise inadmissible testimony, such as this to pollute the fair determination of issues before the jury. Thus, the punishment was way out of proportion to the alleged offense."

Regions Bank v. Gad, 102 So.3d 666 (Fla. 1st DCA 2012)

The trial court granted a motion for attorney's fees pursuant to Florida Statute 57.105. The First District reversed the portion of the award directing payment of the fees because it contained no findings of fact.

Robbins v. Rayonier Forest Resources, LP, 102 So. 3d 737 (Fla. 1st DCA 2012)

On a Motion for Attorney's Fees Pursuant to Florida Statute 57.105, the First District held that the moving party failed to comply with the safe harbor provisions of Florida Statute 57.105(4) and, therefore, was not entitled to attorney's fees as a sanction under this provision. The First District added, however, that Florida Statute 57.105(1)(b) authorized the District Court, on its own initiative, to award the prevailing party a reasonable attorney's fee "on any claim or defense at any time during the civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense initially presented to the court … would not be supported by the application of then-existing law to those material facts." As a result, they remanded the matter to the trial court and ordered the losing party to show cause why attorney's fees should not be assessed as a sanction and why any attorney's fees assessed should not be required to be paid solely by the losing party's attorneys.

Florida Houndsmen Association v. State of Florida, 37 FLW D1353 (Fla. 1st DCA 6/6/12)

This appeal arose from a final order dismissing the Complaint for failure to state a cause of action. The original Complaint challenged an executive order issued by the State of Florida. During the pendency of the Complaint, the challenged executive order was superseded by an administrative rule rendering the

issue raised by the Complaint moot. The State moved to dismiss for this reason amongst others and the circuit court granted the motion to dismiss without prejudice allowing the Plaintiff 30 days to amend. After 30 days passed and no Amended Complaint was filed, the circuit court issued a final order of dismissal. The Plaintiff then sought appellate review and filed an Initial Brief that failed to acknowledge the mootness issue or the fact that they had not taken advantage of their opportunity to amend. After the State raised these points in their Answer Brief, the Plaintiff failed to reply and then continued to ignore these points which were again raised in a motion for attorney's fees.

Having found that there was a lack of legal merit, rather than factual merit, the First District ordered only that the appellant's attorney be responsible for paying the award. The Plaintiff's attorney attempted to withdraw as counsel and argued that he had no involvement in the appeal with the exception of signing a single pleading at the request of his then employer. The appellate court noted that even if this were true, he is still responsible under Florida Rule of Judicial Administration 2.515 and 2.505 because he signed the notice of appeal. The court noted that, at the time he signed the notice of appeal, the frivolous nature of the appeal was already apparent.

Settlement Set Aside -- Discovery Violations

Garvin v. Tidwell, 37 FLW D2506 (Fla. 4th DCA 10/24/12)

The Defendant owned a horse that she boarded in a stable. After observing the Plaintiff ride other horses at the stable, the Defendant asked the Plaintiff, an experienced equestrian, if she would ride the horse in question. The Plaintiff had limited her riding to docile horses in recent years so she asked the Defendant several times whether the horse had ever exhibited any dangerous behavior. The Defendant replied "No." During the Plaintiff's third ride on the horse, he reared up on his hind legs, bolted off at fast gallop, stopped suddenly and abruptly changed directions. As a result, the Plaintiff fell off the horse, hit a fence and fell to the ground. She suffered back injuries which required surgery.

The Plaintiff filed suit alleging negligence and negligent misrepresentation and alleged that the horse in question had a long and well known history of bucking and running away with riders and that the Defendant negligently failed to disclose the horse's dangerous propensities. During discovery, interrogatories and a request to produce was sent to the Defendant. During discovery, the Defendant and her daughter were deposed regarding the horse and they testified of some

instances of the horse being spooked or having bucked, but noted that this was mostly as a young horse and was not a characteristic of the horse. In fact, they testified that his personality was "a gentleman" who was "lazy, if anything." The parties went to mediation and settled the case.

Soon thereafter, the Plaintiff's counsel received an unmarked envelope containing a magazine advertisement for a dietary supplement for horses from earlier that year. The advertisement featured a page about the horse calming successes of a supplement and featured a color picture of the horse in question. The advertisement identified the horse's owner as the Defendant and quoted her as saying that she decided to give the supplement to her horse because he "can be a little difficult at times" and added "what a difference it made in him. Ever he's been on it, we've had nothing but great rides." The Defendant failed to produce this advertisement in response to the discovery requests and never mentioned the use of any calming supplements. Neither the Defendant nor her daughter mentioned the use of calming supplements or difficult behavior during their depositions. When asked by Plaintiff's counsel, defense counsel admitted that he and his client were in possession of the advertisement at the time of the depositions and when they responded to the interrogatories and request for production. The Plaintiff then moved to reopen discovery and rescind the mediation agreement or for sanctions. The Defendants filed a response in which they contended that the advertisement was not responsive to the discovery requests and was not inconsistent with the depositions. Although the trial court denied the Plaintiff's motion to rescind the mediation agreement and for sanctions, the Fourth District reversed and found that the Defendant violated her discovery obligations by failing to disclose the advertisement and information known to her about her horse's behavior which prompted the use of the supplement. Accordingly, the Fourth District ordered that the mediation agreement be rescinded for a unilateral mistake.

Settlement Set Aside – No Meeting of the Minds

Lunas v. Cooperativa de Seguros Multiples de Puerto Rico, 100 So. 3d 239 (Fla. 2d DCA 2012)

The Plaintiff suffered sinkhole damage which was covered under his insurance policy. The Plaintiff, through his attorney, made a demand to settle the claim for the policy limits of $115,861 with a "check split." Specifically, the Plaintiff demanded an $85,000 made out to the insured and the mortgage holder with the other check for $30,861 made out to the insured, his attorney and his public adjuster. The insurance company then sent one check for the policy limits

payable to the insured, the mortgage holder, the public adjuster and the insured's attorney. The Plaintiff refused its tender and the trial court granted the Motion to Enforce Settlement Agreement. The Second District reversed finding that there was not a meeting of the minds although they shared the trial court's concern that the homeowner was trying to deprive the mortgage holder of its legally obligated right to the full insurance proceeds to satisfy its lien.

Summary Judgment

Portales v. Another Beautiful Corp., 37 FLW D1169 (Fla. 3d DCA 5/16/12)

The court heard argument on Motion for Summary Judgment which was denied without prejudice. The parties came back for a calendar call two weeks later and the Defendant renewed its Motion for Summary Judgment. The trial court instructed the Defendant to submit a legal memorandum on the issues and gave the Plaintiff seven days thereafter to respond. Neither party expressed any objection to the procedure for addressing the issues on summary judgment and the trial court ended up granting same. The Third District affirmed and held that the Plaintiff's failure to timely object to the procedure utilized by the trial court was deemed to be a waiver of any objection.

Witness Immunity

Hoskins v. Metzger, 102 So. 3d 752 (Fla. 2d DCA 2012)

Mr. and Mrs. Hoskins had previously filed a lawsuit against Kia Motors. They were represented by Krohn and Moss. The Hoskins lost their trial and they and their attorneys then brought a cause of action against their private investigator/expert who testified for them in the case against Kia Motors. The trial court dismissed the claim based upon the Doctrine of Witness Immunity. The Second District reversed based upon the limited record before them.

Although they reversed, the Second District noted several problems with the claim including the fact that they were suing the investigator for professional negligence even though it did not appear as though he had a college degree. The Second District noted that, in general, a claim of professional negligence can only be alleged if the Defendant is required to have a minimum of a 4-year college degree. The second count of the Complaint sought purely economic losses based upon a theory of simple negligence. The Court noted, based upon the allegations, it was clear that the Plaintiffs or their attorneys had either a written or an oral

contractual arrangement with the investigator (which the Complaint did not mention) and, thus, they pointed out that the economic loss would appear to create difficulty for recover under simple negligence. Third, the Plaintiffs alleged that they would have won the underlying lawsuit had the expert testified in a different fashion (he appeared at trial with "unkept hair" and was wearing "unwashed and excessively worn jeans and a polo-style shirt." At trial, the expert could not support his theory when cross-examined and was impeached concerning his prior experience and because he was unfamiliar with the critical aspects of the "scientific method of investigation."

Work Product

Springhill Health Care Associates, LLC, et al. v. Benlein, 81 So. 3d 624 (Fla. 5th DCA 2012)

It was a departure from the essential requirements of law to order production of documents and answers to interrogatories without first conducting an *in camera* inspection to determine precise nature of ostensibly privileged documents and to further determine applicability of work product and statutory privileges.

Publix Super Markets, Inc. v. Anderson, 92 So. 3d 922 (Fla. 4th DCA 2012)

Plaintiffs in a slip and fall case sought "any and all reports concerning the incident identified in the plaintiff's complaint." Publix asserted work product privilege for an incident report and a "customer incident witness statement." The trial court ordered their production and the Fourth District reversed. The Court held that both documents were created after the slip and fall and thus clearly in anticipation of litigation. Plaintiffs did not show that they were unable to obtain the "substantial equivalent of the material by other means," such as depositions.

Heartland Express, Inc., v. Torres, 90 So. 3d 365 (Fla. 1st DCA 6/25/12)

Deposition questions posed to corporate representative regarding the risk management investigation of an accident were subject to work product privilege. The First District held that because the risk management investigation was conducted in anticipation of litigation, information related to the investigation qualified for work-product protection. Further, counsel could instruct deponent not to answer the questions in order to preserve the privilege.

Wrongful Death-Settlement

Walker v. Bailey, 89 So. 3d 297 (Fla. 5th DCA 2012)

The estate of a deceased 15-year old child settled a medical malpractice claim. Thereafter, the mother, who was the personal representative, filed a petition in the probate court for an equitable distribution of the settlement proceeds asking the probate court to find that she had suffered a "majority" of the loss. Her counsel provided formal notice of the petition to the surviving father and advised him that a hearing on the petition would be held several weeks later. When more than twenty days passed without any response from the father and prior to the scheduled hearing, the probate court entered an order apportioning 100% of the settlement proceeds to the surviving mother. She then notified the father that the hearing was canceled. The father then moved for rehearing asserting his belief that the scheduled hearing was the appropriate time to assert his position and further objected to apportioning the entire settlement to the mother. They also advised the probate court that he wanted to present evidence on the apportionment issue.

The Fifth District reversed and noted that when a wrongful death case is settled before trial, the trial court must resolve questions concerning the apportionment of proceeds between the survivors. Further, the trial court must determine if the proposed apportionment is reasonable and equitable based upon competent, substantial evidence. In this case, the probate court apportioned the settlement without a hearing and without considering any evidence and, therefore, violated the father's due process rights.