2014
CASE LAW SUMMARY

Automobile Liability

Accident Scene Measurements Taken After Discovery Cut-off

Kellner v. David, 140 So. 3d 1042 (Fla. 5th DCA 2014)

In a collision between a motorcycle and a motor vehicle, the Defendant was not permitted to testify regarding accident scene measurements he took several days before trial. In so doing, the trial court found that the measurements were taken after the discovery cut off. Further, the trial court prevented the Defendant from testifying regarding his estimate as to the distance between his vehicle and the motorcycle at the time of the accident.

The Fifth District affirmed noting that rulings on evidentiary matters are generally within the sound discretion of the trial court. They also noted that such testimony should be excluded as surprise under the *Binger* decision. Accordingly, the denial of the new trial was affirmed by the appellate court.

The dissent noted that the Defendant did not have an opportunity to testify to his measurements before the Court called him up to sidebar. There was no objection from the Plaintiff at this point. Further, the dissent noted that the Plaintiff did not ask the Defendant questions regarding his estimate of the distance between the motorcycle and the car at his deposition and, therefore, could not claim surprise. The dissent also noted that an expert is not required in order to measure a distance between vehicles adding that witnesses may generally testify as to both distance and speed.

Bad Faith

Safeco Ins. Co. v. Rader, 132 So. 3d 941 (Fla. 1st DCA 2014)

Plaintiff sued his uninsured motorist carrier, Safeco, for UM benefits. He asserted that Safeco had tendered an unsatisfactory settlement offer. Safeco answered and averred that it previously tendered the full policy - $100,000. Safeco

asserted that this tender operated as a confession of judgment as a matter of law and requested the court enter judgment for the plaintiff for the policy limits.

Plaintiff then moved to amend his complaint to add a bad faith action. The court granted Plaintiff's motion and denied Safeco's motion to enter final judgment in accordance with its confession of judgment. Safeco then filed a motion to remove to Federal court, which was denied as untimely. Safeco filed a writ of certiorari.

The First District denied the writ. Safeco could not meet the threshold element of a material injury that cannot be corrected on appeal. The First District reasoned that at most, Safeco would be delayed in its ability to remove the matter to Federal Court. If the order was reversed, Plaintiff would have to file a new, separate action for bad faith. Safeco could then remove the case and thus its removal right was not permanently deprived. Court also ruled that "showing your hand" at the first trial did not amount to irreparable harm.

GEICO General Insurance Company v. Paton, 150 So. 3d 804 (Fla. 4th DCA 2014)

The insured brought a claim for underinsured motorist benefits. The Plaintiff demanded her $100,000 policy limits, however, GEICO refused to pay this and the case went to trial with a verdict of almost $500,000. GEICO did not file a Motion for New Trial and judgment was entered in favor of the insured but was limited to the $100,000 uninsured motorist policy limit. GEICO then paid the final judgment. With leave of Court, the insured then amended her Complaint to add a claim for bad faith pursuant to Florida Statute §624.155. The Fourth District held that the jury's determination of damages in the first trial which also established liability of the tortfeasor was binding on GEICO in the bad faith trial.

Markel American Insurance Company v. Baker, 152 So. 3d 86 (Fla. 5th DCA 2014)

Markel insured the Defendants in a motorcycle accident. Prior to suit being filed, it tendered its $10,000 policy limit to the Plaintiff; however, her attorney rejected the tender claiming it acted in bad faith by not timely resolving the claim. Thereafter, the Plaintiff filed suit against Markel's insureds. In the months leading

up to trial, a dispute arose as to whether Markel had breached any duties of good faith owed to its insureds in the handling of this claim.

As a result, they filed a declaratory judgment action in Federal Court seeking a declaration that it had not committed bad faith and that it did not breach its duty of good faith owed to its insureds. Before the State Court trial went forward, Markel and the parties entered into a *Cunningham* agreement by which the parties agreed to try the bad faith case first in Federal Court and stay the State Court case.

Based upon the *Cunningham* agreement, Markel agreed that if there was a judicial determination that it breached one or more of its duties of good faith owed to its insureds, it would pay the Plaintiff $400,000 and pay her attorney's fees and costs. Conversely, if the determination was that Markel did not breach one or more of its duties of good faith, then the $10,000 tendered to the Plaintiff would be accepted in full and final payment.

During the pendency of the Federal Court case, a dispute arose as to the scope of the agreement. The Plaintiffs had asserted that the parties did not agree to litigate a "full blown" bad-faith case, but rather, they only agreed to litigate whether Markel breached a single duty of good faith. In doing so, they argued that if they could show a breach of a single duty, then they would be the prevailing parties in the Federal Court action. By contrast, Markel argued that the agreement was not that narrow and that the parties agreed to litigate a traditional bad-faith case, with bad-faith being determined under the totality of the circumstances and standard set forth under Florida law.

The Federal Court did not resolve the meaning of the *Cunningham* agreement, but rather, ordered that the parties seek a determination in State Court regarding their respective rights and obligations, and the scope and meaning of the *Cunningham* agreement. Markel then filed a two-count Complaint in State Court for declaratory relief and for reformation of the *Cunningham* agreement.

The State Court allowed for discovery to proceed and the Plaintiff propounded discovery seeking all communications between Markel and their attorneys regarding the stipulation. They also scheduled the deposition of Markel's corporate representative and Markel filed a Motion for Protective Order asserting that all of the testimony being sought from the corporate representative was attorney/client privileged.

Markel also filed a Motion for Protective Order concerning the deposition of its lead counsel for the same reason. The trial court ultimately ruled that Markel had waived its attorney/client privilege, and at a later hearing, also ruled that the work product privilege had been waived. Markel filed a Petition for Certiorari.

The Fifth District granted certiorari. They stated that because Markel's intent was relevant to the issue of whether there was a mutual or unilateral mistake, it was incumbent to present evidence of their intent with regard to the *Cunningham* agreement. In argument on the Motion for Protective Order, Markel's counsel admitted that the attorneys involved in the *Cunningham* agreement needed to provide testimony with respect to intent; however, it was unnecessary to present evidence of privileged communications to establish this intent.

The Fifth District ruled that the filing of a reformation action, which involves a question of intent, does not automatically result in a waiver of attorney/client privilege. Further, they noted that the possibility that a party's statements concerning its intent in forming the contract could be impeached by confidential communications between that party and his attorney does not give the opposing party a right to have those confidential communications disclosed.

Safeco Insurance Company v. Beare, 152 So. 3d 614 (Fla. 4th DCA 2014)

Safeco's insured sued the third party tortfeasor as a result of an accident. She settled her case and, thereafter, was granted leave to amend the Complaint to add her insurance carrier, Safeco, for her UM benefits and bad faith refusal to settle her claim. Safeco answered the uninsured motorist claim and moved to dismiss the bad faith claim as premature. Ultimately, the trial court abated the bad faith count. Safeco then filed a Petition for Certiorari claiming that it had been irreparably harmed by the denial of its Motion to Dismiss the Bad Faith Claim.

In so doing, they pointed out that the claim was an amendment to the original negligence suit which was filed more than one year prior to Safeco's joinder and thus, it prevented Safeco from removing the claim to Federal Court. While the Fourth District recognized that the inability to remove an action to Federal Court constitutes irreparable harm, they denied the Petition for Certiorari because Safeco had not shown that the trial court departed from the essential requirements of the law.

Bad Faith – Attorney-Client Privilege Applies to Litigation File Unless Insurer Places Counsel's Advice at Issue

GEICO General Insurance Company v. Moultrop, 148 So. 3d 1284 (Fla. 4th DCA 2014)

In this bad faith litigation, the trial court determined that a number of documents from the insurer's attorney's litigation file were privileged, but discoverable having accepted the Plaintiff's argument that the attorney/client information from the underlying suit would be discoverable unless it pertained to bad faith aspects of the case. The Fourth District quashed the trial court's order and granted certiorari and noted that attorney-client privilege communication in the underlying action was not discoverable absent an exception such as when the insurer places counsel advice at issue.

Dangerous Instrumentality

Adams v. Bell Partners, Inc., 138 So. 3d 1054 (Fla. 4th DCA 2014)

Adams was injured in a car accident by a rental car paid for by Bell Partners ("Bell") and authorized for an employee but driven by the employee's husband. Adams sued Bell under the dangerous instrumentality doctrine. Bell Partners filed a motion for summary judgment that it did not consent to the husband driving the vehicle, and that company policy prohibited unauthorized drivers and personal use of rental vehicles.

Three days before the hearing, Bell filed a supplemental memorandum in support raising the arguments that it did not have an identifiable property interest in the vehicle under ownership or bailment and that it did not exercise control over the vehicle. The trial court granted summary judgment finding it was undisputed that Bell did not own, lease, or rent the vehicle.

The Fourth District reversed on grounds that there were issues of fact of whether there was a bailment relationship and if the husband's use constituted conversion. It was also improper to grant summary judgment on grounds raised for the first time three days before the hearing. A court errs when it enters summary judgment upon a ground not raised in the initial summary judgment motion or at least 20 days before the hearing.

Christensen v. Bowen, 140 So. 3d 498 (Fla. 2014)

A person listed on a car title as co-owner is vicariously liable under the dangerous instrumentality doctrine regardless of whether he claims he never intended to be the owner of the vehicle. Such a claim does not bring the co-owner into the Beneficial Ownership Exception, which limits liability where the titled owner demonstrates he did not have authority to exert any dominion or control over the vehicle. A joint title owner does not meet this exception because his rights to control exist whether or not they are actually exercised or intended to be exercised.

Discovery of Cell Phone Contents

Antico v. Sindt Trucking, Inc., 148 So. 3d 163 (Fla. 1st DCA 2014)

Following the filing of a lawsuit for damages related to a death from a motor vehicle accident, the trial court ordered that the Defendant's expert could inspect the decedent's cell phone data from the date of the accident where the Defendant's Motion to Inspect the Cell Phone was supported by specific evidence that the decedent was using a cell phone at the time of the accident. Moreover, the trial court provided specific protections for the data and limited the inspection to the time period in question. As such, the First District denied the Petition for Writ of Certiorari.

Improper to Limit Adverse Defendants to Single Shared IME

Goicochea v. Lopez, 140 So. 3d 1102 (Fla. 3d DCA 2014)

Plaintiff sued three Defendants for injuries sustained in three separate accidents, alleging that injuries from the three accidents were indivisible and superimposed upon one another. The trial court limited the three Defendants to one orthopedic IME. The Third District granted certiorari and found that because the Defendants are adverse to each other, it was improper to limit all Defendants to a single shared IME per specialty.

Loss of Consciousness Defense

Marcum v. Hayward, 136 So. 3d 695 (Fla. 2d DCA 2014)

Trial court should have granted Marcum's directed verdict where she successfully established the defense of loss of consciousness. Marcum suffered a seizure, blacked-out and rear-ended Hayward. Hayward did not put forth an expert to refute Marcum's expert testimony that the seizure was unforeseeable. To establish this defense, the defendant must prove: 1) the defendant suffered a loss of consciousness or capacity; 2) the loss of consciousness or capacity occurred before the defendant's purportedly negligent conduct; 3) the loss of consciousness was sudden; and 4) the loss of consciousness or capacity was neither foreseen nor foreseeable.

Motion to Compel Deposition of Corporate Representative

Racetrac Petroleum, Inc. v. Sewell, 150 So. 3d 1247 (Fla. 3d DCA 2014)

The Plaintiff was injured when her vehicle was struck as she exited from a gas station. The Plaintiff noticed the deposition of the corporate representative with the most knowledge regarding selection of locations for gas stations. Thereafter, the Defendant designated its appropriate representative.

During the course of her deposition, the corporate representative identified other corporate officers who were involved in the selection of location of the gas station. Plaintiff then moved to compel their depositions and the trial court granted same. The Third District upheld this decision noting that Florida Rule of Civil Procedure 1.310(b)(6) does not prevent a party from deposing officers not identified by the corporation in response to a Rule 1.310(b)(6) notice where the corporate designee testifies that other officers have same or similar knowledge.

No Attorney's Fees Where UM Carrier Accepts Coverage

Wapnick v. State Farm Mutual Insurance Company, 134 So. 3d 968 (Fla. 4th DCA 2014)

Plaintiff appealed the denial of her Request for Attorney's Fees after State Farm voluntarily paid the remainder of her uninsured motorist claim. In her prayer

for relief, the Plaintiff included a demand for attorney's fees pursuant to Florida Statutes §627.428 and §627.727(a). The Fourth District held there was no entitlement to attorney's fees in this case because the uninsured motorist carrier was not disputing whether the policy provided coverage herein and thus, the statutes did not apply.

Officer Cannot Testify That Party Violated Right of Way

Shaver v. Carpenter, 39 FLWD 2470 (Fla. 2d DCA 2014) **Not published in most recent volume, no note in Westlaw**

In this motor vehicle accident intersection case, the Second District reversed and ordered a new trial based upon two errors committed by the trial court. First, over the Defendant's objections, a trooper who assisted in the accident investigation was permitted to testify that the Defendant violated the Plaintiff's right of way and that the Plaintiff did not violate the Defendant's right of way.

Secondly, the Plaintiff was allowed to read the Defendant's Answers to Surveillance Interrogatories indicating that the Plaintiffs had been surveilled on eight days. Defense counsel argued against this introduction of evidence because they did not intend to introduce the surveillance videos at trial or present any testimony concerning the surveillance.

As such, the Answers to Interrogatories were not relevant or material and the only purpose for introducing the statements would be to disparage the Defendant by showing that he was spying on the Plaintiffs. In fact, Plaintiffs' counsel did exactly this in closing argument. The Second District stated that "surveillance is a common practice in personal injury cases and is not improper."

Owner of Auto Liable For Accident After Consigned Auto for Sale

Youngblood v. Villaneuva, 141 So. 3d 600 (Fla. 2d DCA 2014)

Youngblood consigned his uninsured vehicle to Teddy Aponte of Extreme Auto Sales with instructions to sell the vehicle. Youngblood testified that he never wanted to see the vehicle again after he handed the keys to Aponte and he gave him no time limit in which to sell the vehicle. Aponte was driving the vehicle for his personal use when he struck and killed Villaneuva. Youngblood contended that

this constituted a theft or conversion which exempted him from liability, however, the jury specifically rejected this as part of it interrogatory verdict.

The jury returned a verdict for, amongst other things, $190,000 in non-economic damages. Youngblood sought a set-off for the pretrial settlement amounts. He also sought the trial court to cap damages for pain and suffering to $100,000 pursuant to Florida Statute §324.021(9)(b)(3).

The Second District reversed finding that it was error to set-off the settlement amounts received from the other Defendants against a non-economic damage award. It further held that because Youngblood had consigned his vehicle to the individual who was driving the vehicle at the time of the accident, it was error to limit Youngblood's liability for non-economic damages to $100,000 pursuant to the statute.

PIP – Ambiguity in Declarations Page

Spaid v. Integon Indemnity Corp., 143 So. 3d 949 (Fla. 1st DCA 2014)

Insured obtained extended PIP coverage under her policy. The declaration sheet had no notation regarding limits of liability next to the coverage which was captioned "extended PIP (100% Medical, 80% Wage Loss)." Above this description was the personal injury protection basic coverage which provided limits of liability $10,000 for each person.

The insured submitted bills and wage losses which exceeded $10,000 and the insurance company denied payment beyond these limits citing to the endorsement within the policy which states "the extended PIP endorsement does not modify or otherwise change the limits of liability of $10,000 contained in the basic PIP endorsement." Finding that the declaration sheet created an ambiguity, the First District ruled that the ambiguity must be construed against Integer as the drafter of the policy.

PIP – Rule of Priorities Applies to PIP Assignees

Northwoods v. State Farm, 137 So. 3d 1049 (Fla. 4th DCA 2014)

A medical provider is precluded from collecting from an insurer where the insurer has exhausted PIP benefits prior to the establishment of the amount to which the medical provider is entitled under PIP. The court explained that the English Rule of Priorities – priority is given to assignee first giving notice to the creditor – does not apply to PIP benefits.

PIP – Setoff

Moody v. Dorset, 149 So. 3d 1182 (Fla. 2d DCA 2014)

In this motor vehicle accident case, the parties agreed to the amount of the PIP set off. Counsel for the Plaintiff stated that he would not stipulate to the PIP set off being handled post-trial, however, the trial court ruled that it "should be handled post-verdict." The Plaintiff objected to the ruling and the trial court overruled same. The Defendant relied on the trial court's ruling and did not present any evidence of the PIP payments.

Following trial, the Defendant moved for application of the PIP set off and the Plaintiff objected citing the Supreme Court's decision in *Caruso v. Baumle*, 880 So. 2d 540 (Fla. 2004), in which the Supreme Court held that unless there is a stipulation otherwise, the defense must present evidence to the jury of the amount of PIP payments the Plaintiff has received so that the jury can then reduce the verdict by the set off. The Second District ruled that it was error for the trial court to deny the set off because the Defendant relied upon the trial court's ruling and because the Plaintiff never argued *Caruso* as a basis for his objection.

PIP – Showing of Bad Faith Required to Hold Insurer Liable Above Statutory Limit

GEICO Indemnity Company v. Gables Insurance Recovery, Inc., 39 FLWD 2561 (Fla. 3d DCA 2014) **Not released for publication in permanent law reports**

The Circuit Court Appellate division erred in affirming the County Court's ruling that GEICO pay an additional $10,000 in PIP benefits after its policy limits

had been exhausted. A showing of bad faith is required before an insurer can be held liable for benefits above the statutory limit.

UM – Family Vehicle Exclusion Does Not Conflict with Statute

Travelers Commercial Insurance Company v. Harrington, 154 So. 3d 1106 (Fla. 2014)

Crystal Harrington was injured in a single car accident while riding as a passenger in a car owned by her father but driven with permission by a non-family member. The vehicle was insured by Travelers and Harrington's mother was the named insured and the purchaser of the policy on the vehicle. The policy insured three cars and provided liability and non-stacked uninsured motorist coverage for Harrington, her mother and her father. The driver, Williams, had his own liability policy with Nationwide. He was also covered as a Class II insured under the Traveler's policy.

After she was injured, Nationwide tendered its policy limits. Travelers also tendered its liability limits for the actions of Williams; the Class II insured. Harrington's damages still exceeded the combined liability payments and she then sought uninsured motorist benefits from Travelers. Travelers denied the claim on the ground that the claim that the vehicle was not an "uninsured motor vehicle" as defined in the policy.

The policy's definition of an "uninsured motor vehicle" included an "underinsured vehicle," however, the policy also contained a "family vehicle exclusion" which expressly provided that an uninsured vehicle does not include any vehicle owned by or available for the regular use of you or a family member unless it is "your covered auto" to which coverage… applies.

The Supreme Court held that the family vehicle exclusion for uninsured motorist benefits did not conflict with Florida Statute §627.727(3) when the exclusion was applied to a Class I insured (Harrington) who seeks such benefits in connection with a single-vehicle accident where the vehicle was being driven by a Class II permissive user and where the driver is underinsured and liability payments from the driver's insurer when combined with liability payments under the Class I insured's policy do not fully cover the Class I insured's medical costs. Further, they held that uninsured motorist benefits are not stackable when such

benefits are claimed by an insured policy holder and where the non-stacking election was made by the purchaser of the policy.

2014
CASE LAW SUMMARY

Insurance Coverage

Bad Faith - Action "Ripe" When Appraisal Determines Damages and Coverage

Cammarata v. State Farm Florida Insurance Company, 152 So. 3d 606 (Fla. 4th DCA 2014)

The trial court entered summary judgment in favor of the insurance company in a bad faith action holding that the bad faith action was not ripe because State Farm's liability for breach of contract had not yet been determined. The Fourth District reversed finding that the bad faith action was ripe where State Farm's liability for coverage and the extent of the insured's damages had been determined by an appraisal award.

Bad Faith – Citizen's Property Insurance Not Immune From Suit

Perdido Sun Condominium Association, Inc. v. Citizen's Property Insurance Corp., 129 So. 3d 1216 (Fla. 1st DCA 2014)

Plaintiff sued Citizen's and alleged that they failed to attempt to settle their property insurance claim in good faith. Their Complaint was filed pursuant to Florida Statute §624.155 which provides a civil remedy for persons damaged by an insurer's failure to settle claims of good faith. The trial court found that Citizens was immune from suit pursuant to Florida Statute §627.351(6)(s)(1). The First District reversed and certified conflict with the Fifth District's decision and *Citizen's Property Insurance Corp. v. Garfinkel*, 25 So. 3d 62 (Fla. 5th DCA 2010).

Coverage for Acts Within Employee's Scope of Duties

Hubner v. Old Republic Insurance Company, 39 FLWD 962 (Fla. 5th DCA 2014)
Opinion has not been released for publication and still subject to revision or withdrawal.

The insurance company issued a liability policy to the Boy Scouts of America which covered its registered volunteers, but only when the volunteers were "participating in an Official Scout Activity and in the scope of their duties as such." Norton was a volunteer whose responsibility was to encourage Boy Scouts to advance by completing requirements for whatever badge level they were working toward.

It was found that he was acting within the scope of his duties at the time of the collision where he had been assisting Scouts and completing an Eagle Scout project at a cemetery, had driven home for the sole purpose of retrieving a camera to photograph the completed project, and was involved in a collision as he was returning home after having taken the photographs.

Examination Under Oath is Condition Precedent to Recovery

Solano v. State Farm Florida Insurance Company, 155 So. 3d 367 (Fla. 4th DCA 2014)

The trial court entered Summary Judgment in favor of State Farm finding that because the insureds had not appeared for an examination under oath as required by the policy provisions, they failed to comply with the conditions precedent to filing suit which required judgment in favor of State Farm and a forfeiture of benefits.

The insureds brought property damage claim following Hurricane Wilma. The policy required the insureds to comply with certain post-loss conditions including submitting to an examination under oath, submitting sworn proofs of loss and giving timely notice of damages, as well as exhibiting damages at State Farm's request. Although State Farm made payments in 2006, the insureds hired a public adjuster in 2009 who asked State Farm to re-open the claim. The public adjuster submitted a claim in excess of $200,000.

State Farm inspected the property with the adjuster and made an additional payment for some damage and notified the insureds that it would continue to investigate the other damage claims. State Farm inspected the property with the adjuster and made an additional payment for some damage and notified the insureds that it would continue to investigate the other damage claims.

Thereafter, the public adjuster submitted several additional sworn proofs of loss increasing the amount of damage claimed. After the third sworn proof of loss, State Farm asked the insureds to submit to an examination under oath. It also asked that the adjuster submit to an examination if the insureds intended to rely upon his knowledge and opinions. The insureds appeared for the examination under oath and filed a fourth proof of loss.

The husband gave his examination under oath and deferred almost entirely to the adjuster as to the type and extent of damages, as well as, the cost of the damage. He also deferred to his wife to answer a few questions. At the end of his interview, he refused to allow his wife to submit to an examination under oath that day because he felt that the examination might put her under too much mental stress. The public adjuster also refused to give a statement under oath, although he said he might do so in the future. The public adjuster took the position that State Farm could not compel him to provide a sworn statement.

Later, State Farm advised the insureds that they had deprived them of a meaningful examination under oath and advised them to present any additional documents or information regarding their claim. State Farm also asserted that the insureds had failed to provide a proper sworn proof of loss. They eventually explained to the insureds what documents were still needed and why it believed the proofs of loss were deficient.

The insureds retained counsel who then submitted a fifth proof of loss and demanded an appraisal. Their counsel offered to submit the wife to an examination under oath. State Farm accepted the fifth proof of loss together with documentation as complying with the policy, but asserted an appraisal was premature until it had investigated the claim. The parties then scheduled the wife's examination under oath and to examine her, as well as the public adjuster and to receive the documentation requested in its letters. Five days before the scheduled examination under oath, the insureds filed a Complaint against State Farm to compel an appraisal.

The wife then appeared for her examination under oath as scheduled and was prepared to testify but State Farm's counsel, citing the filing of the lawsuit and pending litigation, declined to proceed with the examination. State Farm then moved to dismiss the original Complaint and the Plaintiffs filed an Amended Complaint alleging that State Farm had breached the policy by denying coverage. The Amended Complaint did not request an appraisal.

State Farm then moved for Summary Judgment arguing that Plaintiffs failed to comply with their post-loss obligations before filing suit in violation of the policy's "no action" clause. The trial court granted Summary Judgment, however, the Fourth District reversed.

Although the Fourth District has held that a requirement to provide an examination under oath is a condition precedent to recovery and "an insured's refusal to comply with the demand for a statement is a willful material breach of an insurance contract which precludes the insurer from recovery under the policy"; nevertheless, they pointed out that the insureds in this case cooperated to some extent and therefore a fact question remained as to whether the condition was breached to the extent that the insureds should be denied any recovery under the policy.

Specifically, the husband appeared for his Unsworn Statement, gave answers to some of the questions posed and deferred to the adjuster for most of the other information. He arranged for the adjuster to attend an examination under oath, but the public adjuster on his own refused to provide the sworn statement. State Farm did not show that the insureds could have compelled the adjuster to provide a sworn statement and, as such, the Summary Judgment was reversed.

Improper to Force Insurer to Defend Lawsuit Without Resolution of Coverage Dispute

FCCI Commercial Insurance Company, Inc. v. Armour, 132 So. 3d 864 (Fla. 2d DCA 2014)

Armour initiated arbitration proceedings against the general contractor, the prior proper owner and 14 sub-contractors used to complete his residence. After the sub-contractors were dismissed from the arbitration proceedings, he filed a separate action against them in the Circuit Court. FCCI insured two of the sub-

contractors. As a result, FCCI filed a separate declaratory action to resolve its duty to defend and indemnify the two sub-contractors under their insurance policies. The Circuit Court granted Armour's Motion to Stay the Declaratory Action after arguing that consideration of the policy provisions regarding FCCI's duty to defend and indemnify its insured's would involve the same factual disputes and issues raised in the Arbitration and liability actions. The trial court stayed both the declaratory judgment and the liability actions pending the resolution of the Arbitration action. FCCI then filed a Petition for Writ of Certiorari.

The Second District granted the petition and quashed the trial court's decision to stay the declaratory action, noting that the trial court's order would cause irreparable harm to FCCI by forcing it to defend its insureds without resolution of the coverage dispute.

No Prejudice to Insurer Required When Condition Precedent is Breached

Rodrigo v. State Farm Florida Insurance Company, 144 So. 3d 690 (Fla. 4th DCA 2014)

Where the insured failed to file a sworn proof of loss as required by the policy, the insurance company was not obligated to pay because the insured materially breached a condition precedent. An insurance company need not show prejudice when the insured breaches a condition precedent to filing suit.

Notice of Policy Expiration

Rodriguez v. Security National Insurance, Co., Inc., 138 So. 3d 520 (Fla. 3d DCA 2014)

The Third District affirmed summary judgment in favor of an insurer in an action for breach of contract and bad faith in denying coverage to an insured. Rodriguez brought a wrongful death action against the insured stemming from an auto accident. The insured entered into a *Coblentz* agreement with Rodriguez and agreed to a consent judgment of $2.5 million in exchange for assigning his rights to a claim against the insurer. The insured's policy had lapsed 2 months prior to the accident.

Rodriguez argued that the insurer failed to give the insured notice that the policy would expire. The insurer sent notices to the address listed on the policy

application and declarations page, but the address did not list the apartment number.

Without deciding whether the insurer had a statutory obligation to provide notice, the Third District held that the insurer gave sufficient renewal notice. Florida Statute §627.728(5), which deals with notices of cancellation and of intention not to renew, states that proof of mailing to the insured's address shown in the policy shall be sufficient proof of service. Similarly, the Policy required such notices to be mailed to the "address shown in our records." The Third District also noted that an insurer's proof of mailing of a notice of cancellation to the insured prevails as a matter of law over the insured's denial of its receipt.

Prejudice to Insurer Required When Post-Loss Obligation is Breached

Bush v. State Farm Mutual Automobile Insurance Company, 39 FLWD 1575 (Fla. 2d DCA 2014) **Has not been released for publication.**

The Plaintiff filed a claim for uninsured motorist benefits. After receipt of the Complaint, State Farm served a Notice of Examination by an orthopedic surgeon. The Plaintiff objected to the notice and demanded various protections. State Farm advised that it did not agree to her demands and when the time came for the examination, she failed to appear.

Thereafter, State Farm added a defense of "no coverage" to its pleadings and filed a Motion for Summary Judgment arguing that because the Plaintiff breached a policy term, she forfeited coverage. The Plaintiff responded that Summary Judgment was improper because her failure to submit to the examination did not prejudice State Farm or warrant the denial of coverage. The trial court then entered Summary Judgment.

Relying upon the Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014), the Second District held that a Compulsory Medical Examination provision in the UM context is a post-loss obligation of the insured and is not a condition precedent to coverage. Thus, it was error to enter Summary Judgment.

State Farm v. Curran, 135 So. 3d 1071 (Fla. 2014)

A defendant has the burden of pleading and proving prejudice where an insured breaches a compulsory medical examination in an uninsured motorist contract before the insured forfeits benefits under the contract. Different presumptions arise depending on which duty has been breached. Failure to undergo a CME is a failure to cooperate, and the insurer bears the burden to prove prejudice. A failure to provide notice of an accident, on the other hand, gives a rebuttable presumption of prejudice. Further, a CME in a bodily injury policy is a condition subsequent to the policy, whereas, a medical examination for a life insurance policy is a condition precedent to the policy.

Third-Party Indemnification Payment Can Satisfy Self-Insured Retention

Intervest Constr. of Jax, Inc. v. General Fid. Ins. Co., 133 So. 3d 494 (Fla. 2014)

The insured could use payments made by a third-party for indemnification to satisfy its self-insured retention provision. A homeowner sued her general contractor, Intervest, for an injury that occurred while using attic stairs. Intervest was then indemnified by the subcontractor who constructed the stairs for $1 million. Intervest had an insurance policy with General Fidelity with a self-insured retention ("SIR") provision of $1 million. The parties settled at mediation for $1.6 million. Intervest claimed that the indemnity payment satisfied the SIR, thus General Fidelity was responsible for the remaining $600,000.

The SIR provision at issue stated in part:

> "We have no duty to defend or indemnify unless and until the amount of the 'Retained Limit' is exhausted by payment of settlements, judgments, or 'Claims Expense' by you."
>
> "The 'Retained Limit' will only be reduced by payments made by the insured."

The Florida Supreme Court held that under the policy language that existed in the General Fidelity policy, the insured's indemnity rights under its contract with its subcontractor which it pursued and obtained from their insurer, satisfied the SIR and General Fidelity owed the remaining $600,000 to the Plaintiff; unless the *"Transfer of Rights"* provision also commonly referred to as the "*Subrogation Clause*" gave General Fidelity as the liability insurer priority of those funds under the terms of the policy. The Florida Supreme Court held that it did not, based on

the specific language of this policy; and, in recognition of a principle of equity known as the "made whole doctrine".

The Florida Supreme Court agreed that the policy language appeared to be less restrictive than those found in the decisions found in other jurisdictions particularly in California that had terms obligating the insured to satisfy the retained limit it had to make the payment *from its own account*. The Florida Supreme Court found that specific language to be materially different from the terms in this policy which merely required the insured to "make the payment" to meet its SIR threshold, which they found to be more liberal and could be done in many different ways.

For example, the Court noted that, Intervest, by negotiating a contract with a subcontractor where it required indemnity from them as a condition factoring into "the price" of the contract, and then recovering those funds from them, can be construed as the insured having, on its own, exhausted the SIR of $1,000,000.

As it concerns the second certified question, the Supreme Court of Florida anchored its decision in applying the equitable principle, the "made whole doctrine" in finding that the subrogation clause in the policy did not give the insurer, General Fidelity, superior rights over their insured to the funds collected from the subcontractor's insurer.

"The 'made whole doctrine' provides that, absent a controlling contractual provision that states otherwise, the insured has priority over the insurer to recover its damages when there is a limited amount of indemnification available.

The *Transfer of Rights* provision stated that the insured transfers all rights to collect from responsible third parties *for payments we make* to satisfy the insured's legal obligation. The policy defined "we" to mean General Fidelity throughout when used throughout the policy. In this case, albeit somewhat simultaneously, Intervest had already collected the $1,000,000 from the third party in settlement of their indemnity claim. The Florida Supreme Court held that the insured's payment of these funds to the Plaintiff indeed triggered General Fidelity's obligation to pay the $600,000 balance of the settlement.

The Court's decision was grounded, in part, that because Intervest made its $1,000,000 payment *before* General Fidelity paid anything at all, and therefore, the *Transfer of Rights* provision did not apply to abrogate the common law made

whole doctrine giving the insured priority to the funds available from responsible third parties.

Third Party's Cause of Action Against Insurer Does Not Accrue Until Settlement or Verdict Obtained

Star Insurance Company v. Dominguez, 141 So. 3d 690 (Fla. 2d DCA 2014)

The Plaintiff brought a wrongful death case against the County and also brought a count for declaratory relief against the insurance company that provided excess liability coverage for an amount above the sovereign immunity limits. The trial court refused the insurer's request to dismiss the count, deciding to sever it instead.

Even though the trial court had severed the action to prevent the jury from learning about the existence of insurance coverage, the Second District found that this was insufficient noting that Florida Statute §627.4136(1) expressly states that a cause of action against an insurance company by a party that is not its insured, does not accrue until a settlement or verdict has been obtained. The Court went on to state that allowing the party to circumvent the statute by merely instituting a separate action would result in insurance companies having to litigate claims which have not yet accrued and for which the insurance company might ultimately bear no liability. Such an interpretation would, therefore, nullify the protection conferred by the statute.

Untimely Notice of Loss Defense

Lo Bello v. State Farm Florida Insurance Company, 152 So. 3d 595 (Fla. 2d DCA 2014)

In 2002, the Lo Bellos moved into their home. In late 2004, they noticed cracking in their home but believed it to be from normal settlement and did not associate it with sinkhole activity. In 2008, they consulted a public adjuster and then filed a claim under their sinkhole insurance. State Farm then took examinations under oath of the Lo Bellos and denied coverage for the claim based upon late reporting and the assertion that State Farm had been prejudiced by its inability to perform a prompt investigation. They also alleged that the Lo Bellos

failed to take appropriate measures to save or protect the property from further peril.

The homeowners then filed a claim against State Farm and in defense of the claim, State Farm raised the failure to timely report the claim and that they had been prejudiced by the late notice. State Farm was granted Summary Judgment and the Second District reversed holding that there were material issues of fact concerning whether the insureds timely reported of their loss to State Farm.

The Second District stated that, in considering State Farm's defense of untimely notice, the Court's must follow a two-step analysis which requires determining whether notice was timely given, and, if untimely, whether the insurer was prejudiced by the untimely notice. In this case, they ruled that the question as to whether the insureds timely reported the claim to the insurer was an issue of fact for the jury to decide. If the jury determined that the notice was untimely, then the insureds can only recover if they overcome the presumption of prejudice.

2014
CASE LAW SUMMARY

Medical Malpractice

Amendment 7

Ampuero-Martinez v. Cedars Healthcare Group, 139 So. 3d 171 (Fla. 2014)

Following the death of her father, Ms. Ampuero-Martinez filed an action against Cedars and his other healthcare providers. She then sought discovery pursuant to Amendment 7 which the hospital objected to. The trial court overruled the objection and the Third District then quashed the trial court's order "solely on the grounds that the Request to Produce asked for records of adverse medical incidents involving patients other than the Plaintiff, but does not limit the production of those records to the same or substantially similar condition, treatment or diagnosis as the patient requesting access." The Supreme Court quashed the decision of the Third District noting that three years prior to its decision, the Supreme Court invalidated this provision of Florida Statute §381.028(7)(a) in *Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478 (Fla. 2008).

Arbitration Agreement – Must Adopt All Provisions of Chapter 766 to be Valid

Crespo v. Hernandez, 151 So. 3d 495 (Fla. 5th DCA 2014)

The Fifth District reversed an order compelling binding arbitration pursuant to Florida Statute 766 because the arbitration agreement entered into between the doctor and the patient did not adopt all of the provisions of the medical malpractice statutes. In doing so, they certified conflict with *Santiago v. Baker*, 135 So. 3d 569 (Fla. 2d DCA 2014).

Arbitration Agreement – Mother Can Bind Unborn Child and Spouse to Arbitration

Santiago v. Baker, 135 So. 3d 169 (Fla. 2d DCA 2014)

Dr. Baker's patient signed an Arbitration Agreement which provided for both parties to share arbitration expenses equally. After becoming a patient, the patient became pregnant. Several days later, however, the clinic advised her that her pregnancy was non-viable and they recommended a termination of same which the patient declined. Thereafter, the patient resumed taking an over-the-counter drug allegedly believing that spontaneous passage of the fetus would occur. She alleged that she was unaware of the possible adverse effects the drug might have on the fetus. The pregnancy continued and the baby was ultimately born with severe birth defects.

Plaintiffs filed suit and the Defendants filed a Motion to Compel Arbitration which the trial court granted. The Second District affirmed even though the Arbitration would affect the baby and the baby's father (patient's husband) who were not parties to the Arbitration Agreement.

Caps on Non-Economic Damages in Wrongful Death Cases are Unconstitutional

McCall v. United States of America, 134 So. 3d 894 (Fla. 2014)

In a plurality decision, the Florida Supreme Court held that the statutory cap on non-economic damages pursuant to Florida Statute §766.118 violated the right to equal protection under the Florida Constitution in wrongful death actions only. In so doing, Justice Lewis, writing for the plurality, engaged in extensive fact finding and determined that not only was there not a medical malpractice crisis at the time the caps were instituted, there was also no ongoing medical malpractice crisis which would justify the imposition of the caps. This decision was joined in by Justice Labarga.

Justice Pariente, writing on behalf of Perry and Quince, issued a concurring in result only opinion in which she concurred that the statutory cap on wrongful death non-economic damages violated the equal protection clause of the Florida Constitution and further agreed that there was no evidence to support that there

was an ongoing medical malpractice crisis. Chief Justice Polston and Justice Canady dissented.

Causation – Treating Physician's Testimony Cannot Insulate Defendant from Own Negligence

Saunders v. Dickens, 151 So. 3d 434 (Fla. 2014)

The patient saw the Defendant neurologist and complained of back pain, leg pain and unsteadiness on his feet. The patient also advised that he was experiencing cramps in his hands and feet, as well as, numbness in his hands and feet. The doctor concluded that, because the patient displayed normal reflexes, the numbness and tingling in his hands was due to peripheral neuropathy secondary to diabetes. The neurologist did not perform a test to confirm this diagnosis. Instead, he recommended that the patient be admitted to the hospital for an MRI of the brain and lumbar spine.

After receiving results of the lumbar spine MRI, the neurologist asked the subsequent treating neurosurgeon for consultation. The neurosurgeon performed an examination and then performed lumbar surgery. It was believed that the patient would later need cervical surgery. The patient's condition continued to deteriorate after he had lumbar surgery. He became a quadriplegic and ultimately died; never having had the cervical surgery.

The estate settled with the neurosurgeon and went to trial against the original neurologist. The Plaintiff presented expert testimony that the neurologist had breached the standard of care by failing to recognize that the Plaintiff's symptoms could be related to cervical cord compression. Another expert testified that, had the surgery been performed and addressed the cervical cord compression, the patient, more likely than not, would not have become quadriplegic.

The Defendant's expert suggested that it was reasonable for the neurosurgeon to perform surgery on the lumbar spine originally. The Defendant also introduced the deposition of the neurosurgeon who was a former Defendant. This deposition was taken prior to settlement. The neurosurgeon testified that, even if he had possessed the results of the cervical MRI, he would have not have operated on the neck because the patient had not yet experienced problems with his upper extremities.

At the close of the evidence, the neurologist moved for a directed verdict contending that the deposition of the neurosurgeon rendered it impossible for the Plaintiff to establish that his injury had been caused by any negligence of the Defendant. The trial court denied the motion. In closing argument, the Defendant argued that the Plaintiff had not established causation.

In doing so, he emphasized that the neurosurgeon testified that even if the neurologist had ordered the MRI of the cervical spine, he would not have done anything differently. The Defendant then asked the jury how they could find the neurologist responsible when the neurosurgeon had testified that he would not have done anything differently.

The estate's lawyer sought a curative instruction that *Fabre* is an affirmative defense for which the Defendant bears the burden of proof. As such, the Plaintiff argued that he did not have to prove that the non-party neurosurgeon was never negligent; however, the trial court refused to give this instruction.

The Supreme Court determined that telling the jury that the original Defendant could not be held liable because the subsequent doctor said he would not have done anything differently was a misstatement of law. Rather, the Plaintiff was only required to establish that the doctor's care fell below that care of a reasonably prudent physician and that more likely than not, adequate care by the neurologist would have prevented the patient's injuries. As a result, they believe the trial court erred in permitting the Defendant to mislead the jury during closing.

The Supreme Court further held that it was error to allow the Defendant to argue that the Plaintiff had not proven causation based upon the neurosurgeon's testimony in his deposition at a time in which he was in an adversarial relationship with the Plaintiff. They concluded that the testimony that the subsequent treating physician would not have treated the patient differently was irrelevant and inadmissible and could not insulate the Defendant physician from liability for his own negligence.

"Because the central concern in medical malpractice actions are the reasonably prudent physician's standard, the issue of whether a treating physician acted in a reasonably prudent manner must be determined for each individual physician who is a Defendant in a medical malpractice action. A subsequent treating physician simply may not be present at the time a Defendant physician

makes an allegedly negligent decision or engages in a potentially negligent act. Further, it is not only the final physician, but rather, each treating physician who must act in a reasonably prudent manner."

"We hold that a physician cannot insulate himself or herself from liability for negligence by presenting a subsequent treating physician who testifies that adequate care by the Defendant physician would not have altered the subsequent care. To do so would alter the long-established reasonably prudent physician standard where the specific conduct of an individual doctor in a specific circumstance is evaluated."

"It would place a burden on the Plaintiff to somehow prove causation by demonstrating that a subsequent treating physician would not have disregarded the correct diagnosis or testing, contrary to his or her testimony and irrespective of the standard of care for the Defendant physician. To require the Plaintiff to establish a negative inappropriately adds a burden of proof that is simply not required under the negligence law of this State."

Duty - No Duty to Inform Patient of Availability of Abortion in Another State

OB/GYN Specialists of the Palm Beaches v. Mejia, 134 So. 3d 1084 (Fla. 4th DCA 2014)

The Plaintiffs were the parents of a child born with significant birth defects. During her pregnancy, the mother suffered from episodes of bleeding and was sent for ultrasounds. The first ultrasound was limited due to the position of the fetus; however, the report noted abnormalities which prompted the mother's referral for genetic counseling and a more detailed ultrasound. At the genetic counseling session, the Plaintiffs were advised of the significance of the abnormalities seen on the prior ultrasound and were given the option of undergoing amniocentesis to screen for genetic abnormalities.

The mother declined the amniocentesis procedure, but returned for a Level II ultrasound. The Level II ultrasound reported that the views of the upper extremities were limited, that the hands of the fetus were not visible, and the position of the fetus's feet looked normal. The report also noted that there were "four limbs" and the impression was "the anatomy seen on the Fetal II ultrasound

appears normal. Fetal growth is appropriate. Limited upper extreme [sic] nose, lips."

When the mother gave birth, she learned for the first time that the baby had no hands, only one leg and a fraction of a foot attached to the hip on the other leg. The allegation made against the Defendant was that she fell below the standard of care by failing to advise the Plaintiffs in a timely manner that the fetus had limb defects thereby preventing them from making an informed decision as to whether they should terminate the pregnancy.

Prior to trial, the Defendants sought to preclude the Plaintiffs from presenting any evidence or argument that the Level II ultrasound caused any damages citing Florida Statute §390.0111 and argued that even if the Level II ultrasound had been reported accurately, the mother could not have obtained a lawful abortion in Florida because it was performed one day into the mother's third trimester of pregnancy.

The Plaintiffs argued however, that she was not in her third trimester when the Level II ultrasound was performed. The trial court ruled that any reference or evidence regarding the prohibition against third trimester abortions was irrelevant, concluding that the mother was not in the third trimester of pregnancy based upon counsel's representation regarding the date of conception, Further, admitting evidence of the statute would create a "trial within a trial," regarding whether any exceptions to the statute applied, and the case did not involve a claim that the Defendant should have performed or recommended termination of the pregnancy.

The Fourth District did a detailed analysis of gestational age and determined that the Level II ultrasound was performed on the first day of the third trimester. Nevertheless, they noted that if the statute should be interpreted to measure pregnancy from the alleged time of conception, thereby allowing the mother two weeks after the ultrasound to obtain a lawful abortion, the existence of the statute would still be irrelevant to whether the mother could have logistically obtained an abortion in Florida before the statutory deadline.

The Plaintiffs contended that had the Level II ultrasound been properly interpreted, the mother could have traveled to another state to obtain an abortion at her stage of pregnancy or could have secured a third trimester abortion in Florida or elsewhere under an applicable statutory exception. The Fourth District refused

to allow this argument and declined to establish a duty to provide information to a patient that she could legally undergo a third trimester abortion in another state in which that physician was not licensed.

Duty - Doctor Can Be Liable for Patient's Suicide When Actions Create Foreseeable Zone of Risk

Granicz v. Chirillo, 147 So. 3d 544 (Fla. 2d DCA 2014)

The decedent had a history of depression and was seeing Dr. Chirillo, her primary care physician, who treated her for depression. The decedent was taking Prozac when she began seeing Dr. Chirillo and he switched her to Effexor. Unbeknownst to Dr. Chirillo, the decedent stopped taking the Effexor in June/July of 2008 because of its side effects.

In October of 2008, the decedent called Dr. Chirillo's office and advised his medical assistant that she had not felt right since late June/July. She reported that she was under mental strain, was not sleeping well, and was taking more sleeping pills. She attributed these problems to the Effexor and she told the assistant she stopped taking it.

The assistant wrote this information in a note to Dr. Chirillo. He read the note and then decided to change the decedent's anti-depressant to Lexapro. Dr. Chirillo's office called the decedent and told her she could pick up samples of Lexapro, along with a prescription. They did not request that the decedent schedule an appointment with the doctor. The decedent picked up the samples and prescription later that day and the following day she hung herself.

The Plaintiff sued Dr. Chirillo for breaching his duty to exercise reasonable care in the treatment of the decedent. The Defendant filed a Motion for Summary Judgment arguing that Dr. Chirillo had no duty to prevent the decedent from committing an unforeseeable suicide. The Second District reversed and held that the proper inquiry the trial court should have conducted was to determine whether the Defendant's conduct created a foreseeable zone of risk; not whether Defendant could foresee the specific injury that actually occurred. In so doing, they certified conflict with the First District's decision in *Lawlor v. Orlando*, 795 So. 2d 147 (Fla. 1st DCA 2001).

Ex-Parte Conferences – Defendant Hospital Can Have Ex-Parte Contact with Employed Physicians

Damsky v. University of Miami, 152 So. 3d 789 (Fla. 3d DCA 2014)

The Plaintiff sued the University of Miami for medical malpractice. In the course of preparing the case for trial, attorneys for the University had *ex parte* contact with Dr. Jamie Barkin, a gastroenterologist at Mount Sinai Medical Center who treated the patient for problems resulting from her surgery. The Plaintiffs filed a Petition for Writ of Certiorari seeking to quash the trial court's order finding that any communication between Dr. Barkin and the University was privileged and that communications with him was permissible.

In this case, the trial court determined that Dr. Barkin was an employee of the University. Thus, the Third District found that the Plaintiff had not suffered irreparable harm which would trigger issuance of a Writ of Certiorari because even though the Order prevents the Plaintiffs from taking discovery to learn the contents of the communications between the University and Dr. Barkin, this is something that can be remedied on appeal. Secondly, the Plaintiffs contend that the Order allows the University to engage in future *ex parte* communications with Dr. Barkin. The Third District agreed that such an Order could be reviewed by certiorari, however, the the language of the Order expressly prohibited such communications without further Order of the Court. Therefore, the Petition failed because it did not demonstrate irreparable harm.

Ex-Parte Conferences – Presuit Authorization Does Not Violate HIPAA

Murphy v. Dulay, 768 F.3d. 1360 (11th Cir. 2014)

The District Court found that Florida Statute §766.1065 was preempted by and violated HIPAA. The 11th Circuit reversed the trial court and found that the statute which requires an authorization to release protected health information and allow for ex-parte interviews of healthcare providers was fully compliant with HIPAA and was not preempted by Federal law.

Presuit – Notice Due to Legal Relationship

Young v. Naples Community Hospital, 129 So. 3d 456 (Fla. 2d DCA 2014)

Frances Young went to Naples Community Hospital on the evening of February 18, 2006, with complaints of severe abdominal pain and vomiting. Early the following morning, she underwent several tests including a CT scan. The scan was read by Dr. Grennan who was in Switzerland at the time. He reported the scan as being "unremarkable." Despite this, she was admitted to the hospital and, because of continued complaints of abdominal pain, an MRA was performed later that afternoon. The MRA results were reported on February 20, 2006, as showing suspected emboli. The CT scan reviewed by Dr. Grennan was then re-evaluated and was found to have evidence of a thrombosis. Approximately an hour later, she underwent surgery to remove the blood clot. She was discharged from the hospital on April 12, 2006, following surgery and complications in her recovery.

She later retained an attorney who filed an automatic extension of the Statute of Limitations. On April 1, 2008, the Plaintiffs gave notice of their intent to initiate a lawsuit against Naples Radiologists, the local provider of the hospital's radiological services. On June 17, 2008, they sent Notices of Intent to Dr. Grennan and Nighthawk Radiology, the company that provided night time radiological services for Naples Radiology.

After suit was filed, all of the Defendants moved for summary judgment alleging that the Plaintiffs failed to provide their Notice of Intent within two years. The trial court denied the motions of Naples Community Hospital and Naples Radiology, but granted the motion of Nighthawk and Dr. Grennan finding that the Plaintiffs were required to filed their Notice of Intent by May 8, 2008; that the attempt to obtain a 90-day extension was ineffective; and that the June 17, 2008 notice to Nighthawk and Dr. Grennan was served outside the statutory time period.

The Second District reversed the summary judgment finding that there was a "legal relationship" between Naples Radiologists and Nighthawk Radiology/Dr. Grennan. Nighthawk and Dr. Grennan argued that they did not have a "legal relationship" because they were neither employees nor servants of the Hospital or Naples Radiology. The Second District disagreed with this interpretation. In so doing, they noted that there was no definition of "legal relationship" in Florida Rule of Civil Procedure 1.650(b). Further, Nighthawk and Dr. Grennan admitted

that Nighthawk had a written contractual relationship with Naples Radiology and that Dr. Grennan was an independent contractor for Nighthawk. As such, the Second District found that these were business relationships as defined by the law of contracts such that they were in a "legal relationship" with the radiology group.

NICA – Formation of Provider-Patient Relationship Triggers Obligation to Provide NICA Notice

N.R. v. NICA, 143 So. 3d 463 (Fla. 5th DCA 2014)

In this case, the Fifth District reversed for determination by the Administrative Law Judge as to when the provider-obstetrical patient relationship was formed because that is what triggers the obligation to furnish the notice under NICA. The determination of when this relationship commences is a question of fact. Likewise, when the patient first becomes an obstetrical patient of the provider and what constitutes a reasonable time are also issues of fact.

Nursing Home Arbitration Agreements

Zephyr Haven Health & Rehab Center v. Clukey, 133 So. 3d 1230 (Fla. 2d DCA 2014)

The nursing home appealed the trial court's denial of it Motion to Dismiss and to Compel Arbitration. The Second District reversed finding that the Personal Representative, acting under a durable power of attorney which stated that she could act on the decedent's behalf with respect to "claims and litigation" and "all other matters" had authority to enter into an Arbitration Agreement. It further held that the trial court erred in finding that the Arbitration Agreement was substantively unconscionable because the estate did not have the ability to pay the cost of arbitration.

F.I. Tampa, LLC v. Kelly-Hall, 135 So. 3d 563 (Fla. 2d DCA 2014)

A resident of a nursing home who subsequently died entered into an Arbitration Agreement with the facility. The Estate filed suit against the nursing home and the nursing home filed a Motion to Compel Arbitration. The trial court denied the Motion to Compel finding that the agreement provided that because the

Arbitration fees were to be borne equally by both parties in Arbitration, it would be prohibitively expensive for the Estate.

The Second District reversed and found that the Plaintiff failed to establish that the cost of Arbitration would likely exceed the cost of litigation and therefore did not meet her burden of showing that the cost of Arbitration were prohibitively expensive. Further, the agreement provided for Arbitration to be administered pursuant to the procedures of AAA or JAMS.

The trial court denied the Motion to Compel Arbitration because AAA's healthcare statement provides that it does not accept the administration of cases involving individual patients unless there was a post-dispute agreement to arbitrate. The Second District found that this was an improper basis to deny the Motion to Compel because the terms, as stated, did not render the agreement impossible to perform. The agreement did not require the use of AAA or JAMS but rather, noted that the Arbitration simply had to be administered pursuant to their procedures.

Lopez v. Andies, Inc., 137 So. 3d 528 (Fla. 4th DCA 2014)

A resident of an Assisted Living Facility appealed the trial court's granting of a Motion to Compel Arbitration. The Arbitration Agreement provided that any controversy or dispute between the parties would be resolved by arbitration as provided by the American Health Lawyers Association alternative dispute resolution rules. Because these rules required that the "clear and convincing evidence" standard apply to awards of consequential, exemplary or special damages in a tort action, the rules were contrary to public policy and the Fourth District found it was error to grant the Motion to Compel Arbitration.

Greenbrook NH, LLC v. Sayre, 150 So. 3d 878 (Fla. 2d DCA 2014)

The trial court denied the nursing home's Motion to Compel Arbitration because portions of the Arbitration Agreement were obscured due to a photocopying error. The Second District reversed and held that because the remaining terms of the agreement were sufficiently clear and definite to form a contract, the arbitration clause was enforceable pursuant to the agreement reached when the resident was admitted to the nursing home.

Stratton v. Port St. Lucie Management, LLC, 149 So. 3d 100 (Fla. 4th DCA 2014)

As part of the admission agreement entered into, an attorney's fees provision was included which would have allowed the nursing home to recover attorney's fees if the Arbitrators ruled in their favor. The court held that, under these circumstances, the prevailing resident would also be entitled to her attorney's fees and costs as a prevailing party.

Sovereign Healthcare of Tampa v. Yarawasky, 150 So. 3d 873 (Fla. 2d DCA 2014)

The Second District held that an Arbitration clause in an admission agreement was unenforceable where the nursing home resident did not sign the admission and the financial agreement and the resident's wife who signed the agreement as the responsible party did not have authority to sign on the resident's behalf. The Second District found that the wife signed the agreement only in her individual capacity as the responsible party.

Hancock v. Northport Health Services of Florida, 150 So. 3d 1262 (Fla. 5th DCA 2014)

The decedent's estate filed a claim against the nursing home alleging various violations of Chapter 400. The nursing home moved to compel Arbitration pursuant to the Arbitration provision contained in the admission agreement. The trial court found that the Arbitration provision was not unconscionable. The Fifth District affirmed the Order Compelling Arbitration; however, it reversed that portion of the Order which required the parties to apply Alabama substantive law.

The Fifth District also found that it was error to require application of the Florida Procedural Rules where the Arbitration provision stated that the parties were to engage in discovery consistent with the Alabama Rules of Civil Procedure and no convincing argument was raised as to why the application of Alabama procedural rules was problematic.

Presuit – Motion to Dismiss for Failure to Have Qualified Presuit Expert

Bery v. Fahel, 143 So. 3d 962 (Fla. 3d DCA 2014)

As part of its presuit investigation, the Estate submitted an Affidavit of Khilnani, an emergency physician, to corroborate its claims against Fahel, a family physician. The trial court conducted an evidentiary hearing and made a determination that Khilnani was unqualified to act as an expert against Fahel. The Third District affirmed, finding that there was competent substantial evidence to support the trial court's conclusion. It should be noted that Khilnani previously sought to withdraw himself as an expert.

Nieves v. Viera, 150 So. 3d 1236 (Fla. 3d DCA 2014)

Dr. Nieves is a board certified orthopedic surgeon and he performed surgery on the decedent. All agreed that the surgery was successful and the patient was doing well in the recovery room. Several hours later, after being administered pain medication by hospital nursing staff, she suffered a respiratory arrest. Four days later, she died.

During those four days, the hospital staff never called Dr. Nieves and Dr. Nieves never called upon the patient. He claimed he had no duty or obligation to the patient beyond checking on her in the recovery room and believed that, after that point, responsibility for the patient's care was with the nursing staff and staff physicians caring for her.

Dr. Nieves received a Notice of Intent which contained an Affidavit from a physician practicing pulmonology and internal medicine. Dr. Nieves moved to dismiss the Complaint filed against him on the ground that this physician did not practice in the same or similar specialty "that includes the evaluation, diagnosis or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients." It should be noted that this claim arose before the amendment to Florida Statute §766.102(5)(a)(1), which has since deleted the "similar specialty" language from the statute. After the trial court denied the Motion to Dismiss, Dr. Nieves filed a Petition for Certiorari.

The petition was denied. The Third District pointed out that Dr. Nieves claimed that the trial court's order should have been quashed because it failed to

conduct an evidentiary hearing on his Motion to Dismiss. Notably, Dr. Nieves never requested an evidentiary hearing but rather, repeatedly argued that the Affidavit did not meet the requirements of the Statute "on its face." The Third District held that it was not a departure from the essential requirements of law for the trial court to fail to hold an evidentiary hearing on a Motion to Dismiss on the grounds that pre-suit conditions of filing suit had not been satisfied where an evidentiary hearing had not been requested.

Presuit - When is a Claim, a "Claim for Medical Negligence?"

Buck v. Columbia Hospital Corp., 147 So. 3d 604 (Fla. 4th DCA 2014)

The patient was admitted to the hospital with complications due to Chronic Obstructive Pulmonary Disease. While being moved from a gurney to the x-ray table, the patient was accidentally dropped. As a result of being dropped, the patient sustained a fracture of her lumbar spine and ultimately died. The Plaintiff filed a claim for simple negligence and did not provide the hospital with presuit notice. As a result, the trial court dismissed the Complaint and the Fourth District affirmed finding that this was a claim for medical negligence.

Winter Haven Hospital, Inc. v. Liles, 148 So. 3d 507 (Fla. 2d DCA 2014)

Following the death of a 49-year old woman, her daughter signed a permission form authorizing the hospital to perform an autopsy. Upon her receipt of the autopsy report, the daughter inquired about a second autopsy at the funeral home and then learned that her mother's internal organs had not been returned to the funeral home after the autopsy. She then contacted the hospital and learned that her mother's organs had been incinerated.

The daughter brought a claim for outrage against the pathologist and the hospital. The hospital filed a Motion to Dismiss arguing that this was a claim for medical malpractice, however, the trial court denied same and the Second District affirmed finding that the autopsy did not constitute the rendering of medical care or services, and, moreover, it was the decedent's daughter who sought compensation for damages; not the patient or someone on her behalf.

Following a verdict against the hospital, the Second District found that there was no basis to support a finding of outrage against the hospital for the actions of

the pathologist because he never spoke to his daughter and was unaware of her wishes. Moreover, he had never had a family ask for the return of the organs following an autopsy.

As for the hospital, the Second District concluded that there was sufficient evidence to support a claim of outrage against the hospital because she had specifically told the hospital staff she did not want her mother cremated. Moreover, her mother's organs had been incinerated along with the hospital's other trash.

Holmes Regional Medical Center v. Dumigan, 151 So. 3d 1282 (Fla. 5th DCA 2014)

The patient was admitted to the hospital for cardiac bypass surgery and left the hospital a double amputee. During the course of the surgery, the patient was administered contaminated Heparin which caused him to develop a severe bacterial infection that lead to the amputations. The Complaint alleged that the Heparin supplier had issued a recall of its contaminated product prior to the surgery and that the hospital failed to have adequate procedures in place to respond to the recall.

The claim was only brought against the hospital. The healthcare providers who participated in the surgery were not named as Defendants. There was no allegation that the administration of Heparin was below the standard of care nor were there any allegations that the healthcare workers knew or had any reason to know that the Heparin was tainted. In summary, the claim focused on the administrative policies and actions of the hospital in responding to the recall of the contaminated Heparin.

The hospital filed a Motion to Dismiss for failure to presuit and the motion was denied. The Fifth District affirmed finding that no medical judgment or skill was exercised by the hospital and the alleged wrongful act occurred months before the surgery in question. Accordingly, the Petition for Certiorari was denied.

Statute of Limitations – Presuit Notice to Sovereign Entity

Exposito v. University of Miami School of Medicine, 141 So. 3d 633 (Fla. 3d DCA 2014)

A premature infant was born at Jackson Memorial Hospital on July 11, 2005, who now suffers from seizures, cerebral palsy, spastic quadriplegia, cortical blindness and brain damage. On July 6, 2009, the attorneys for the mother sent written notice to the Public Health Trust, the Florida Department of Financial Services and others pursuant to Florida Statute §768.28(6). On July 10, 2010, she filed her Complaint alleging malpractice by the Defendants.

The original and Amended Complaints included allegations regarding conditions precedent, to-wit: "all statutorily required conditions precedent to the maintenance of this action have been performed, have occurred, or have been waived. Plaintiffs have complied with all the requirements of applicable Florida Statutes, prior to the filing of this action." Specific compliance with the sovereign immunity statute, §768.28(6) was not separately alleged, although the proposed Second Amended Complaint would have added such an allegation and would have attached copies of the statutory notices of claim and return postal receipts.

After a determination that the claim was not barred by NICA, the trial court heard argument on Defendants' Motions to Dismiss which included that the claim was barred by the statute of limitations because Plaintiff failed to comply with the sovereign immunity statute by not filing her Notices of Claim within three years of the incident. The trial court found these arguments to be persuasive; however, the Plaintiff was allowed to file a Motion to Amend with a proposed Second Amended Complaint which included copies of the statutory notices and return receipts. The trial court ultimately granted the Motion to Dismiss and denied the Motion to Amend.

The Third District reversed and found that the original pleading of performance of the conditions precedent was sufficient although the Court noted a Second District decision which upheld the dismissal of the Complaint which did not specifically allege compliance with Florida Statute §768.28. See *Wright v. Polk County Public Health Trust Unit*, 601 So. 2d 1318 (Fla. 2d DCA 1992). The Third District stated that this issue did not need to be addressed, however, because the proposed Second Amended Complaint proffered the actual notices.

The Third District also found that when the three year time period in Florida Statute §768.28 began to run is a mixed factual and legal question. Lastly, the Third District noted that a defense based on accrual and alleged untimeliness whether under Florida Statutes §768.28 or §95.11 should be pled as an affirmative defense and is not appropriate for disposition on the face of a complaint.

Statute of Limitations – Successive Notices of Intent Can Cumulatively Toll Limitations Period

Salazar v. Coello, 154 So. 3d 430 (Fla. 3d DCA 2014)

Plaintiff was allegedly injured as a result of a surgical procedure. Less than two years before the running of the stature of limitations, the Plaintiff obtained an automatic 90-day extension. With thirty days remaining on the extended statute, the Plaintiff then sent a Notice of Intent to initiate litigation to the surgeon who performed the surgery, but did not send to any of the anesthesiologists. More than 90 days later, the Plaintiff issued a Notice of Intent to the anesthesiologist. Upon filing of suit, the anesthesiologist moved for summary judgment on the issue of the statute of limitations. The trial court granted it and the Third District reversed noting that the 90-day tolling of the statute of limitations, which is effective upon receipt of the Notice of Intent to initiate litigation, tolls the statute of limitations as to all prospective Defendants known to the Claimant who have yet to be served with a Notice of Intent to initiate litigation, as well as, the Defendants receiving the notice.

2014
CASE LAW SUMMARY

Negligence

Absence of Evidence that Proposal for Settlement Made in Bad Faith

State Farm Insurance Company v. Reyes, 137 So. 3d 1123 (Fla. 3d DCA 2014)

State Farm filed a nominal Proposal for Settlement and then received a final summary judgment in its favor. The trial court entered an Order denying the motion for attorney's fees without any specific basis for the denial. A transcript of the hearing on the motion indicated that the Plaintiffs argued that the Proposals for Settlement were nominal and in bad faith and that State Farm had made similar nominal offers on "late filed" Hurricane Wilma claims in 68 other cases.

An 18 minute hearing on the motion consisted of argument of counsel and there was no opportunity to assess the particular facts of the other 68 cases. On the face of this record, the Third District found that there was no bad faith in State Farm's proposal and no determination of bad faith by the trial court. Therefore, they reversed with directions to enter an award granting State Farm its reasonable attorney's fees and costs.

Actions Within Scope of Employment

Trabulsy v. Publix Supermarket, Inc., 138 So. 3d 553 (Fla. 5th DCA 2014)

While Trabulsy was shopping in Publix, he momentarily left his grocery cart unattended. Blanton, a store employee, noticed the unattended cart and assumed it had been abandoned. He retrieved the cart and began to re-shelve the items. When Trabulsy discovered that his cart had been moved, he confronted Blanton and the two got into an altercation that culminated with Blanton shoving Trabulsy, thereby causing him to fall to the floor. The two gave conflicting accounts of the dispute; both claiming that the other was the aggressor.

The trial court granted Summary Judgment; however, the Fifth District reversed. In doing so, they noted that "conduct is within the scope of employment, if it occurs substantially within authorized time and space limits, and is activated at

least in part by a purpose to serve the master. The purpose of the employee's act, rather than the method of performance thereof, is said to be the important consideration."

Adding that the record could support the conclusion that Blanton did not act in self-defense, but instead overreacted to Trabulsy's complaint, the Fifth District pointed out that a jury, if it accepted this version of the facts, could still conclude that Blanton's loss of control was motivated by his purpose to serve Publix. "In other words, although his method might have been inappropriate, his purpose was, nevertheless, to serve his employer."

Discovery of IME Doctor's Litigation History

Orthopedic Care Center v. Parks, 155 So. 3d 377 (Fla. 3d DCA 2014)

In this motor vehicle accident case, the Defendant retained Rolando Garcia, M.D., a physician with Orthopedic Care Center, to perform an IME. During his deposition, Dr. Garcia provided a list of the depositions and trials he had participated in in the prior three years. Dr. Garcia estimated that approximately 70% of the cases were for the defense and 30% were for the Plaintiffs. When asked to review the list to see if there were any patients that he could identify from the list, he was unable to do so.

The Plaintiff then issued a subpoena to Orthopedic Care Center asking them to identify which of the persons or cases on the list provided by Dr. Garcia were actual patients. The Center objected and moved for protective order. The trial court denied the objection and the Center then filed a Petition for Certiorari which was also denied.

The Third District found that there was no abuse of discretion in ordering the representative of the Center to make this determination. Further, there was no merit to the claim that the trial court's order violated the statutory protection against disclosure of patient information because the Order did not require any reports regarding the patient's medical condition be produced. Moreover, it was the doctor who provided the list of the names of the cases originally.

Discrepancies Between Testimony and Surveillance are Best Resolved by Jury

Guillen v. Vang, 138 So. 3d 1144 (Fla. 5th DCA 2014)

The trial court dismissed the Plaintiff's personal injury claim following a motor vehicle accident for fraud on the Court. Surveillance showed the Plaintiff performing activities that he allegedly claimed in his deposition that he could not perform. The Fifth District reversed finding that this did not constitute clear and convincing evidence sufficient to support dismissal with prejudice for fraud on the Court adding that the discrepancies between the testimony and the surveillance are best resolved by a jury.

Duty to Prevent Misconduct of Third Persons

Knight v. Merhige, 133 So. 3d 1140 (Fla. 4th DCA 2014)

Court declined to extend duty to parents for murders committed by adult son with psychiatric problems and violent history. The parents supported their son financially and otherwise. His parents secretly told him to go to a family Thanksgiving at a relative's house despite the hosting family expressly telling them not to bring him. Many family members feared the son and his mother even told an unidentified witness that she hoped he would not kill everyone at Thanksgiving. He was not denied entry into the home. Midway through an uneventful meal, he walked outside and returned with a gun. He killed his aunt, two sisters (one pregnant), a six-year old girl and wounded others.

The Fourth District upheld dismissal of the family member's complaint against the parents. To hold a defendant liable for the criminal acts of a third party requires:

- Either a special relationship between the plaintiff and defendant; or
- The defendant's control over: the premises where the injury occurred; the instrumentality causing the injury; or the person causing the injury.

The Court further reasoned - even if the question of duty was one of foreseeability alone, public policy warranted dismissal where the defendant's conduct involved the inclusion of an adult family member into the extended family circle.

The parents had no special relationship with the plaintiffs to protect them from the son's conduct. Family members generally owe no heightened obligation to protect other adult family members from each other. Plaintiffs did not allege that the parents controlled the gun or premises. A "special relationship" exists when one takes charge of a third person whom he knows or should know to be likely to cause harm to others if not controlled. The "take charge" requirement is limited to the context of professional custodians with special competence to control the behavior of those in their charge. The parents did not have sufficient control over their son's actions to place him in the functional equivalent of their legal custody – financial support and inviting him to the dinner was not enough.

Although the Court seemed to suggest that duty could arise through foreseeability analysis, it declined to create the duty for public policy reasons. The Court reasoned that family members with psychological or behavioral problems are a common occurrence and families should be encouraged to include them in the family circle.

Dorsey v. Reider, 139 So. 3d 860 (Fla. 2014)

Dorsey got into a verbal dispute at a bar with Reider and Noordhoek. As Dorsey left, he was confronted in the parking lot. Reider blocked his passage and Noordhoek struck Dorsey with a tomahawk. The Third District reversed and remanded for entry of judgment for Reider, holding that Reider owed no relevant duty to Dorsey when he was attacked by Noordhoek.

Reider owed a duty as his conduct in blocking Dorsey's ability to escape from an escalating situation created a foreseeable zone of risk posing a general threat of harm to others. Further, while a party does not generally have a duty to prevent the misconduct of third persons, the courts have carved out exceptions where the party has actual or constructive control of: 1) the instrumentality; 2) the premises where the tort was committed; or 3) the tortfeasor.

The Florida Supreme Court found that Reider had constructive control of the instrumentality – it was in his unlocked truck and Reider had the key to lock the car remotely. He also had actual control of the area because he continued to block Dorsey's escape when the tomahawk was used. The Florida Supreme Court also considered that Reider saw Noordhoek with the tomahawk. Dorsey did too and asked Reider "what is this?" This occurred 10-15 seconds before the attack, yet Reider did not stop Noordhoek or let Dorsey escape.

Exceeding Scope of Invitation Changes Status on Premises

Denniser v. Columbia Hospital Corp. of South Broward, 39 FLWD 990 (Fla. 4th DCA 2014) **Opinion has not been released for publication and still subject to revision or withdrawal. Most recent reporter's oldest case is June 2014, so not sure this will be published**

The Plaintiff's mother was a patient in the hospital. During one visit, the Plaintiff went in to a kitchen through a closed, unlocked door, to get some tea. Inside the kitchen area, she allegedly slipped and fell on the wet floor causing injury. She sued the hospital claiming that she was an invitee.

In a Motion for Summary Judgment, the hospital's risk manager testified by way of Affidavit that the subject kitchen area was for use only by the employees and staff of the hospital and was "not to be used by patients and/or visitors of the hospital." A sign posted on the wall next to the entry door read "Pantry" and "Staff Only." There was no evidence that the Plaintiff was ever given permission to enter the kitchen.

The hospital moved for Summary Judgment arguing that the Plaintiff lost her status as an invitee and became an uninvited licensee or trespasser by going into an area of the hospital that was beyond the scope of her invitation. As such, the hospital argued that it was required to warn the Plaintiff of concealed dangers only if her trespass was discovered. The hospital denied that any employee was aware of the Plaintiff's presence in the kitchen before she fell.

The trial court granted Summary Judgment and the Fourth District affirmed the finding that the Plaintiff was an uninvited licensee or trespasser because there was no evidence to the contrary. Summary Judgment was, however, reversed because there was no sworn evidence in the record to support the motion. Specifically, pages of the deposition relied upon in the Summary Judgment were not attached to the motion nor included within the record on appeal.

Exculpatory Clauses

Gillette v. All Pro Sports, LLC., 135 So. 3d 369 (Fla. 5th DCA 2014)

The Plaintiff sued a Go-Kart facility alleging that their employee negligently increased go-cart speed, thereby causing her to lose control of the go-kart and crash into a railing. The court granted summary judgment ruling that a waiver and release form signed by the Plaintiff precluded her negligence action. The Fifth District reversed and noted that clauses that intend to deny an injured party the right to recover damages from another who negligently causes injury are strictly construed against the party seeking to be relieved of liability.

As such, the wording of such clauses must be so clear and understandable that an ordinary and knowledgeable person will know what he or she is contracting away. Here they found that the release was not so clear that the negligence of the sort complained of was intended to be within the scope of the release and therefore, the cause was remanded.

Diodato v. Islamorada Asset Management, Inc., 138 So. 3d 513 (Fla. 3d DCA 2014)

On August 20, 2009, the decedent and her husband signed a Release for a shallow reef dive. On the reverse side of the releases, the decedent and her husband initialed boxes stating "this Release is valid for one year from the date of this Release." They returned to the dive shop on April 14, 2010 and again, before the dive, they signed other Releases but did not initial the box providing for the one year operative period.

On the morning of April 15, 2010, which was the day the wife died, they arrived late and did not sign a Release. The dive they were supposed to go on that day was an open water wreck dive; a dive for which, according to the Plaintiff, dive industry standards dictated a particular form of Release must be used. In fact, the Defendant admitted that they used different Releases for these more advanced open water dives.

On the morning of the dive, the decedent showed apprehension about diving. The reason for her apprehension was not known, however, ocean swells were estimated between 4-5 feet. The dive instructor and the decedent's husband

entered the water first. The decedent followed, but after only submerging to a depth of approximately 10 feet, she signaled to the dive instructor that she wanted to surface.

She surfaced with a dive instructor accompanying her, however, he did not help her on board the boat. She reached for and held onto the dive boat's granny line, but lost her hold and drifted away from the boat. The boat's captain sounded an alarm and after a brief search, she was found floating after having drowned.

The trial court granted Summary Judgment on the basis of the release signed in August, 2009. Having examined the release that was signed for the shallow dive, as well as the release that was intended to be obtained for the advanced open water dive, the Third District reversed noting once again that Courts' disfavor and narrowly construe pre-claim exculpatory terms and releases.

Expert Opinions Subject to Daubert Test

Perez v. Bell South Telecommunications, Inc., 138 So. 3d 492 (Fla. 3d DCA 2014)

A Bell South call center operator became pregnant. Her treating physician classified the pregnancy as "high risk" and recommended a week of bed rest. A few months later, the patient reported being under a lot of stress at work and her obstetrician gave her a note stating that she could only work a maximum of 40 hours per week due to her high risk pregnancy and she should be allowed frequent bathroom breaks. Within two weeks, she was fired for non-performance and two days later, she suffered a placental abruption and delivered her child 20 weeks early.

In his deposition, the obstetrician testified that it was his opinion that work place stress, exacerbated by Bell South's alleged refusal to accommodate her medical condition, was the causal agent of the abruption and the early delivery of her son with his attendant medical consequences including multiple surgeries and developmental deficits. This testimony was the only testimony linking the premature birth to Bell South, however, the obstetrician testified that there was no way of ever knowing for sure what caused the placental abruption. In fact, he testified that his conclusions were purely his own personal opinion and not supported by any scientific research.

Specifically, he testified that he was unaware of any studies that showed stress to be a factor in determining the likelihood of a placental abruption nor were there any studies that showed a connection between stress and abruption. He also was unaware of any medical literature that showed a correlation between stress and placental abruption. The trial court struck these opinions under the *Frye* test.

More recently, the legislature amended Florida Statute 90.702 and Florida became a "*Daubert*" jurisdiction. The statute provides that "if scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a factual issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify about it in the form of an opinion or otherwise, if: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case."

Applying the *Daubert* test to this case, the Third District noted that the "subject of an expert's testimony must be scientific knowledge. In order to qualify as scientific knowledge, an inference or assertion must be derived by the scientific method. The touchstone of the scientific method is empirical testing - - developing hypotheses and testing them through blind experiments to see if they can be verified." The court added that "general acceptance in the scientific community alone is no longer a sufficient basis for the admissibility of expert testimony." Therefore, "subjective belief and unsupported speculation are henceforth inadmissible." Accordingly, they affirmed the striking of the expert's opinion.

Expert's Unsupported Opinion Does Not Place Medical Condition at Issue

Gray v. Richbell, 144 So. 3d 573 (Fla. 4th DCA 2014)

In this motor vehicle accident case, Plaintiffs' expert theorized that the Defendant's age and physical condition contributed to causing the accident despite never having reviewed any of the Defendant's medical records. The Plaintiffs then sought and obtained the Defendant's medical records and deposed his treating physicians over his objection and Request for Protective Order.

Because of that discovery, the Plaintiff then requested a neurological examination of the Defendant. The Defendant objected and argued that his

medical condition had not been placed into controversy and that the Plaintiff had failed to show good cause for the examination.

Just prior to trial and with no action having been taken on the Defendant's objection to the IME, the Plaintiffs' expert opined that the Defendant was suffering from dementia at the time of the accident even though none of the Defendant's treating physicians had ever diagnosed him with this condition. Less than a week before trial, the trial court overruled the Defendant's objection and ordered him to undergo the examination. A Petition for Certiorari was filed and the Fourth District granted same noting that it was his conduct (i.e. whether he was negligent in failing to avoid a car that veered into his lane of traffic) that was at issue and not his mental or physical health.

Facebook Discovery

Root v. Balfour Beatty Const. LLC, 132 So. 3d 867 (Fla. 2d DCA 2014)

Root's son was struck by a car outside a construction site. Root sued the construction contractor and raised a claim of loss of parental consortium. The Second District quashed an order granting "carte blanche" access to Plaintiff Root's Facebook page and specifically quashed:

i. Any counseling or psychological care obtained by Root before or after the accident;

2. Any and all postings, statuses, photos, "likes" or videos related to Root's

i. relationships with [injured son] and other children, both prior to, and following, the accident;

ii. Relationships with other family members, boyfriends, husbands, and/or significant others, both prior to, and following the accident;

iii. Mental health, stress complaints, alcohol use or other substance use, both prior to and after, the accident;

v. Facebook account postings relating to any lawsuit filed after the accident by Root or others.

In quashing the order, the court reasoned that the categories above did not relate to Root's loss of parental consortium. Nor had the defendants shown that the

requested discovery was relevant and discoverable. The court pointed to a comment by defense counsel that "these are all things that we would like to look under the hood, so to speak, and figure out whether that's even a theory worth exploring."

Fifth Amendment Privilege

Doolittle v. Shumer, 152 So. 3d 779 (Fla. 5th DCA 2014)

The Plaintiff sued the Defendants, the owners of a dog that attacked him and his dog. A third Defendant, the dog walker, was also sued. Six weeks after one of the owners filed their Answer and Affirmative Defenses, she was criminally charged for actions arising from the same incident that gave rise to the civil action. She then filed a Motion to Abate the civil action until such time that she could testify without compromising her Fifth Amendment rights of self-incrimination.

The trial court abated the entire action until further order of the Court. The Plaintiffs then filed a Petition for Certiorari and the Fifth District granted same as it applied to the abatement as to the other Defendants. As to the Defendant claiming the Fifth Amendment right, the petition was denied without prejudice for the Plaintiffs to seek further relief if the trial court either indefinitely stayed the case against her or did not otherwise consider a less intrusive means to safeguard her Fifth Amendment privilege.

Four Minutes Not Sufficient to Place Store on Constructive Notice of Transitory Substance

Walker v. Winn-Dixie Stores, Inc., 39 FLWD 1750 (Fla. 1st DCA 2014) **Has not been released for publication in permanent law reports**

Due to waiver on the issue of whether Florida Statute §768.0755 applies retroactively, the First District applied the statute to this case and affirmed a Summary Judgment in favor of Winn-Dixie. Plaintiff brought a slip and fall action alleging that the store had constructive knowledge of the dangerous condition. Through testimony, it was established that, at most, any water that had been on the floor may had been there for one to four minutes.

The Court held that the brief time period was "insufficient to satisfy the statute's requirement that the alleged dangerous condition must exist 'for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition' before constructive knowledge of the condition can be imputed."

No Duty to Make Landscaping Areas Safe for Walking

Wolf v. Sam's East, Inc., 132 So. 3d 305 (Fla. 4th DCA 2014)

Landowner does not have a duty to make its landscaping areas safe for walking when it already provided concrete walkways for invitees to cross the landscaping areas. Relying on *Dampier v. Morgan Tire & Auto, LLC*, the Fourth District explained that tree roots in a landscaping area were so obvious and not inherently dangerous as to constitute a non-dangerous condition as a matter of law.

The court was not persuaded by the assertion that the roots were not easily visible – "we conclude that anyone who walks into a landscaping area containing trees, grass, and mulch is held to know that the landscaping area presents 'a hazard to walking,' particularly when concrete traverses have been specifically constructed to prevent this type of accident."

Psychological IME Must Define Boundaries of Exam on Notice

Maddox v. Bullard, 141 So. 3d 1264 (Fla. 5th DCA 2014)

Plaintiff filed a claim for damages which included a claim for mental anguish after having been bitten by the Defendant's dog. The trial court granted the Request for a Compulsory Psychological Examination, however, the order specified only the time, place and the name of the psychologist who would perform the examination. Plaintiff's counsel had asked the trial court to define the boundaries of the psychologist's examination, however, the trial court declined to do so. Specifically, it did not specify the manner, conditions, or the scope of the examination.

As a result, the Fifth District noted that this gave the psychologist "carte blanche" to perform any type and all manner of psychological inquiry, testing, and analysis of the Plaintiff for up to four continuous hours. Accordingly, the court

granted the petition and noted that while the trial court could order the examination, it needed to specify the items requested by Plaintiff's counsel.

Scope of Expert Discovery

Brana v. Roura, 144 So. 3d 699 (Fla. 4th DCA 2014)

The Defendants issued subpoenas to a hospital where Dr. Grabel performed spinal surgeries and sought "each and every document…to include all records, pertaining to [Dr. Grabel]." The trial court allowed these subpoenas to be issued over objection and the Fourth District granted certiorari and quashed the subpoena noting that the subpoenas would require the production of confidential medical records of Dr. Grabel's patients adding that the respondents failed to show compliance with Florida Statute §456.057(7)(a) which requires notice to patients whose medical records are sought before issuance of a subpoena for the records.

The Fourth District also granted certiorari and quashed the subpoenas issued to insurance carriers which required disclosure of financial information concerning payments made by those carriers to Dr. Grabel for services provided as a litigation expert. In doing so, they noted that "a subpoena may not be used to secure discovery of financial or business records concerning a litigation expert unless 'unusual or compelling circumstances' have been shown."

Brown v. Mittleman, 152 So. 3d 602 (Fla. 4th DCA 2014)

In this motor vehicle accident case, the Plaintiff's attorney referred her client to Dr. Brown who treated the Plaintiff under a letter of protection. Another law firm joined as Plaintiff's co-counsel and the Defendant subsequently subpoenaed the person with the most knowledge at Dr. Brown's office to produce documents regarding patients previously represented by both law firms, letter of protection cases and referrals from the Plaintiff's attorneys. The trial court overruled the objections and Dr. Brown filed a Petition for Writ of Certiorari arguing that Florida Rule of Civil Procedure 1.280(b)(5) prohibits the discovery and that the relationship with the second law firm is not discoverable because there is no evidence that the firm directly referred the Plaintiff to Dr. Brown.

The Fourth District denied the petition noting that the discovery was limited to a reasonable timeframe and was not overly intrusive and that the trial court had

broad discretion to order production of documents regarding patients previously represented by the law firms, letters of protection cases and referrals from Plaintiff's attorneys in order to uncover an ongoing relationship between the doctor and the Plaintiff's lawyers which might, in turn, reveal bias.

Scope of IME Physician's Testimony

Boyles v. A & G Concrete Pools, Inc., 149 So. 3d 39 (Fla. 4th DCA 2014)

The Plaintiff was allegedly injured as a result of this 2008 motor vehicle accident. Notably, the Plaintiff had been involved in an accident in 2001 and claimed that he suffered from four herniated discs as a result of that earlier accident. When the patient's pain did not improve from the 2008 accident, he was referred to Dr. Katzman. Notably, the Plaintiff never told Dr. Katzman that he had any prior injuries to his neck.

When Dr. Katzman later discovered that the patient had experienced back pain from the 2001 accident, the patient maintained that the problems had resolved at least two years before the 2008 accident. When conservative treatment did not improve the patient's symptoms, Dr. Katzman performed a lumbar procedure and then a cervical procedure. Dr. Katzman related both procedures to the injury sustained in the 2008 accident. The lumbar procedure was successful, however, the cervical procedure was not successful.

The patient then saw Dr. Dare; a neurosurgeon. During the initial evaluation with Dr. Dare, the patient did not advise him of the 2001 car accident nor did he advise him of the treatment for back pain he received over many years. Dr. Dare later received medical records from the Plaintiff's attorney revealing a prior medical history, he questioned the patient who reported that he was back to normal at the time of the 2008 accident. Dr. Dare performed additional surgery on the patient's back and his condition ultimately improved.

An IME was subsequently performed and the IME physician stated that he would not have recommended surgery because the patient did not show neurological deficits. Two years before trial and before the IME, the Plaintiff filed an extensive Motion in Limine which, amongst other things, sought to exclude testimony regarding unnecessary or unreasonable surgeries. The Fourth District admonished against the use of these kinds of motions and criticized the fact that

the motion was generic and filed before most evidence was even in the record, as well as, the fact that it was argued so long before the trial.

The Judge who entered the order on the Motions in Limine did not try the case. A successor Judge looked at the Motion in Limine and it appears as though he suggested that timely objections would be necessary. When the IME physician was questioned regarding the unnecessary surgery, the Plaintiff failed to object. As such, the Fourth District found that the issue was not preserved.

Further, they noted that even if the lawyer had preserved the objection, the testimony of the IME doctor still could be admitted because the testimony did not involve an expert trying to attribute subsequent malpractice or trying to avoid subsequent malpractice, but rather, the testimony had to do with the causal link between the surgeries and the accident in question. Further, in cases where the IME testimony was ruled to be inadmissible, the claim was that the inappropriate or unnecessary surgery worsened the Plaintiff's condition. Here, however, the Plaintiff's own witnesses testified that that surgery made the condition better.

Stacking of Inferences

O'Malley v. Ranger Const. Indus. Inc., 133 So. 3d 1053 (Fla. 4th DCA 2014)

Trial court incorrectly granted summary judgment on basis of stacking of inferences. Defendant took one inference, that standing water caused the accident, and attempted to stretch in into multiple inferences. Where there is only one inference related to causation, the summary judgment non-movant does not have to establish that the sole inference is the only reasonable inference.

The court also discussed the *Voelker* exception to the rule against stacking of inferences – when a predicate inference is the only reasonable inference that can be made from the evidence, it is no longer an inference but is deemed an established fact. Finally, the court explained that summary judgment should not be granted based on a non-movant's failure to meet its trial burden of proof on the issue of causation.

Sovereign Immunity Does Not Apply to Operational-Level Function

Bergmann v. Florida Department of Transportation, 144 So. 3d 582 (Fla. 1st DCA 2014)

The decedent was involved in a collision on a roadway over which the Department of Transportation had jurisdiction. It was alleged in the Complaint that the Department created a known hazardous condition involving a hidden danger of which is was aware and that the Department failed to correct or warn against this danger. The trial court determined that the claim was barred by sovereign immunity however, the First District reversed and found that this encompassed an operational-level function to which sovereign immunity did not apply.

Transitory Substance Statute is Not Retroactive

Pembroke Lakes Mall, Ltd., v. McGruder, 137 So. 3d 418 (Fla. 4th DCA 2014)

Florida Statute §768.0755, which requires the plaintiff to prove a business establishment had actual or constructive knowledge of a transitory substance does not apply retroactively. Conflicting with the Third District in Kenz, the Fourth District reasoned that the statute did not state it was to be applied retroactively and the plaintiff's substantive rights were affected by introducing a new knowledge element into the claim.

The case also states that the previous version of the statute imposes a non-delegable duty on the premises owner to maintain their premises in a reasonably safe condition. Then, relying on a case from 1995, the Fourth District states that when an owner owes a non-delegable duty to a plaintiff who obtains a verdict assigning negligence to the owner and a party contracted by the owner, the owner is jointly and severally liable for the negligence attributed to the contracted party.

Feris v. Club Country of Fort Walton Beach, Inc., 138 So. 3d 531 (Fla. 1st DCA 2014)

The First District reversed entry of final summary judgment in favor of Club Country in a slip and fall case. Feris slipped on the dance floor on what he believed was alcohol. He testified that other patrons were drinking on the dance floor, that he did not have a drink in hand when he fell, that he felt a liquid substance that smelled of alcohol, and that he did not know how long the substance had been on

the floor. Others' testified to the effect that it was normal for patrons to bring drinks on the dance floor. The trial court entered summary judgment on the basis of §768.0755, Florida Statute, which places the burden on the plaintiff to establish the defendant's actual or constructive knowledge of the dangerous condition. This statute was enacted after Feris' fall. Feris argued that §768.0710, Florida Statute, applied.

The First District found that §768.0755 did not apply retroactively, a decision in conflict with the Third District's holding in *Kenz v. Miami Dade County*, 116 So. 3d 461 (Fla. 3d DCA 2013). Regardless, Feris met his burden of proof to survive summary judgment under either statute. His testimony presented circumstantial evidence from which a jury could infer that Club Country or its agents allowed or caused a dangerous condition to exist, or that this condition existed with such regularity that Club Country knew or reasonably should have known of its existence.

Worker's Compensation Defense

VMS, Inc. v. Alfonso, 147 So. 3d 1071 (Fla. 3d DCA 2014)

VMS entered into a contract with the Florida Department of Transportation to maintain and manage portions of different roadways. Pursuant to that contract, VMS was obligated to secure worker's compensation insurance. It is undisputed that they did so. VMS then subcontracted work to ABC. The contract required ABC to secure worker's compensation insurance and they did so.

Thereafter, ABC hired Lazaro Contreras to perform some of the work that ABC had obligated itself to do. Contreras then hired day laborers including Alfonso to complete the work. While performing work covered by the VMS/ABC/Contreras contract, Alfonso was seriously burned when hot tar spilled on him. Alfonso was immediately taken to the hospital where it was reported that he had sustained the burns while working at home.

The evidence regarding VMS' knowledge of this incident was disputed, however, there was no dispute that Contreras did not have worker's compensation insurance and that ABC and VMS did not report this incident to their compensation carriers. Alfonso never asserted a claim for worker's compensation benefits, but instead filed suit against both ABC and VMS for negligence. VMS

responded and claimed worker's compensation immunity. ABC settled its portion of the case with Alfonso.

Thereafter, Alfonso moved for an entry of partial summary judgment against VMS arguing that they were estopped from claiming worker's compensation immunity and from asserting comparative negligence because they failed to notify its worker's compensation carrier that Alfonso had been injured. The trial court agreed, however, the Third District reversed. In doing so, they held that VMS was not liable for injuries sustained by Alfonso where it had secured worker's compensation coverage for Plaintiff by virtue of the coverage secured by its sub-contractor. The Court also found that VMS had no obligation to notify its carrier of the Plaintiff's injury and could not be estopped from asserting the immunity.

Baker v. Airguide Manufacturing, LLC, 151 So. 3d 38 (Fla. 3d DCA 2014)

Baker began working for a company called Pacesetter; an employment agency that supplies employees to short-handed companies. Pacesetter placed Baker along with other Pacesetter employees with Airguide. While working at Airguide 2 years later, Baker suffered an injury. An Airguide supervisor helped her to wash the wound and then called Pacesetter to deal with the injury. Pacesetter sent a driver to pick her up and then brought her back to the Pacesetter facilities where she filed a report. She was subsequently taken to a doctor's office and then to a hospital. She then successfully filed a worker's compensation claim and, after receiving an unsatisfactory amount, she filed an action against Airguide. Airguide moved for Summary Judgment arguing that it was immune from liability because Baker was either a borrowed servant or was an employee of the help supply service company provided under Florida Statute §440.11(2).

The Motion for Summary Judgment relied heavily upon Baker's deposition testimony. In her testimony, she testified that she reported directly to Airguide in the mornings, was trained to use the machines by Airguide employees, was monitored and reprimanded by Airguide employees and was assigned weekly hours and tasks by Airguide management. Two days before the Summary Judgment hearing and 4 months after her deposition, she filed an Affidavit and an errata sheet that materially conflicted with the statements she made during her deposition. The trial court entered Summary Judgment ruling that Airguide was entitled to worker's compensation immunity. The Third District also pointed out that a party may not rely on an Affidavit that contradicts or repudiates prior

deposition testimony to defeat a Motion for Summary Judgment. *See Ellison v. Anderson*, 74 So. 2d 680, 681 (Fla. 1954).

2014
CASE LAW SUMMARY

Procedural and Legal Issues

Additur

Joseph v. GEICO Indemnity Company, 137 So. 3d 503 (Fla. 2014)

Following a verdict in their favor in an uninsured motorist action, the Plaintiffs filed a Motion for Additur 19 days after return of the jury's verdict. After the motion was served and 31 days after the verdict was entered, the Court entered its judgment in favor of the Plaintiffs in accordance with the jury's findings. The other post-trial motions filed by the Plaintiffs were dismissed by the trial court as untimely. The Plaintiffs asserted that their Motion for Additur could be considered because the 10 day rule in effect at the time the motion was filed did not apply to Motions for Additur. The trial court heard arguments on the Request for Additur and then denied the motion.

An appeal was filed from the order denying the Motion for Additur however, no appeal was ever filed against the final judgment. The Defendants filed a Motion to Dismiss the appeal arguing that the Fourth District did not have subject matter jurisdiction over the appeal because the Motion for Additur was untimely served. The Fourth District agreed and dismissed the appeal. In so doing, they noted that "a Motion for Additur is the equivalent of a conditional Motion for New Trial…[and]…therefore it must also be served within the same number of days after the verdict to suspend rendition of the final judgment."

REWJB Dairy Plant Associates v. Bombardier Capital, Inc., 152 So. 3d 21 (Fla. 3d DCA 2014)

Following a verdict in favor of the Plaintiff, the trial court entered an Additur because the verdict did not reconcile with the evidence. The Defendant rejected the Additur. The Additur statute provides that if an adversely affected party does not agree to the Additur, the Court shall order a new trial on the issue of damages only. In this case, however, the Third District noted that liability was highly disputed and the jury's verdict was a result of some type of compromise on

the issue of liability and, therefore, a new trial on both liability and damages was required.

Arbitration

F.I. Tampa, LLC v. Kelly-Hall, 135 So. 3d 563 (Fla. 2d DCA 2014)

A resident of a nursing home who subsequently died entered into an Arbitration Agreement with the facility. The Estate filed suit against the nursing home and the nursing home filed a Motion to Compel Arbitration. The trial court denied the Motion to Compel finding that the agreement provided that because the Arbitration fees were to be borne equally by both parties in Arbitration, it would be prohibitively expensive for the Estate.

The Second District reversed and found that the Plaintiff failed to establish that the cost of Arbitration would likely exceed the cost of litigation and therefore did not meet her burden of showing that the cost of Arbitration were prohibitively expensive. Further, the agreement provided for Arbitration to be administered pursuant to the procedures of AAA or JAMS.

The trial court denied the Motion to Compel Arbitration because AAA's healthcare statement provides that it does not accept the administration of cases involving individual patients unless there was a post-dispute agreement to arbitrate. The Second District found that this was an improper basis to deny the Motion to Compel because the terms, as stated, did not render the agreement impossible to perform. The agreement did not require the use of AAA or JAMS but rather, noted that the Arbitration simply had to be administered pursuant to their procedures.

Lopez v. Andies, Inc., 137 So. 3d 528 (Fla. 4th DCA 2014)

A resident of an Assisted Living Facility appealed the trial court's granting of a Motion to Compel Arbitration. The Arbitration Agreement provided that any controversy or dispute between the parties would be resolved by arbitration as provided by the American Health Lawyers Association alternative dispute resolution rules. Because these rules required that the "clear and convincing evidence" standard apply to awards of consequential, exemplary or special damages in a tort action, the rules were contrary to public policy and the Fourth District found it was error to grant the Motion to Compel Arbitration.

Hancock v. Northport Health Services of Florida, 150 So. 3d 1262 (Fla. 5th DCA 2014)

The decedent's estate filed a claim against the nursing home alleging various violations of Chapter 400. The nursing home moved to compel Arbitration pursuant to the Arbitration provision contained in the admission agreement. The trial court found that the Arbitration provision was not unconscionable. The Fifth District affirmed the Order Compelling Arbitration; however, it reversed that portion of the Order which required the parties to apply Alabama substantive law.

The Fifth District also found that it was error to require application of the Florida Procedural Rules where the Arbitration provision stated that the parties were to engage in discovery consistent with the Alabama Rules of Civil Procedure and no convincing argument was raised as to why the application of Alabama procedural rules was problematic.

Attorney's Fees – Allocation of Awardable Fees

Effective Teleservices, Inc., v. Barot, 132 So. 3d (Fla. 4th DCA 2014)

Party seeking attorney's fees has the burden to allocate them to the issues for with fees are awardable or to show that the issues were so intertwined that allocation is not feasible.

Court did not err by not requiring each attorney who worked on the file to personally appear at the fee hearing. Supervising attorneys with personal knowledge of their work could testify on their behalf.

Attorney's Fees – Discovery of Opposing Counsel's Billing Records

GEICO General Insurance Company v. Paton, 133 So. 3d 1071 (Fla. 4th DCA 2014)

The trial court entered orders that permitted discovery of the billing records of GEICO's attorneys. The records were sought by the Plaintiff to support her claim for attorney's fees and specifically to support the award of a multiplier. The Fourth District reversed noting that "where the billing records of opposing counsel are sought solely for the purpose of supporting a claim for attorney's fees, the parties seeking production must establish that the requested material was actually

relevant to a disputed issue, that the records sought are needed to prepare for the attorney's fee hearing, and that substantially equivalent material cannot be obtained by another source." In light of the fact that this discovery was only done to support the award of a multiplier, the Fourth District found that there was no basis for the discovery of these materials and granted certiorari.

Butler v. Harter, 152 So. 3d 705 (Fla. 1st DCA 2014)

The Defendant filed a Proposal for Settlement which was far in excess of the judgment entered in favor of the Plaintiff. Thereafter, they filed a motion for fees and costs. The motion included invoices itemizing the costs and fees incurred and also an Affidavit from one of the attorneys of record stating that the invoices were correct and that the costs and fees were necessarily incurred. The Plaintiff then filed a Request for Production of the entire file of Petitioner's counsel pertaining to the case. The Defendant objected on the basis that portions of the file were protected by attorney/client and work product privilege and filed an itemized privilege log.

The trial court entered an order granting the Plaintiff's Motion to Compel production of the materials and found that the litigation file needed to be reviewed in order to determine whether the Defendant's offer was made in good faith. The trial court concluded that the Defendant had waived attorney/client privilege by the filing of the Affidavit and also found that a party cannot claim work-product privilege in connection with a claim for recovery of attorney's fees. The trial court made no case-specific determination concerning the need for overcoming the work-product privilege in this case nor did it state what about this particular attorney's fee affidavit constituted waiver of the attorney/client privilege.

The First District granted certiorari and quashed the Order noting that discovery of the litigation file was unnecessary in order to determine whether the Offer of Judgment was made in good faith. Further, the work product privilege extends to Motions for Attorney's Fees and the Plaintiff had failed to prove the need or undue hardship to overcome this immunity from discovery. Further, it was error to conclude that attorney/client privilege was waived when counsel filed an Affidavit stating that invoices attached to the Motion for fees were accurate.

Attorney-Client Privilege – Discovery of Fee Agreement

Tumelaire v. Naples Estates Homeowners Association, 137 So. 3d 596 (Fla. 2d DCA 2014)

A member of the mobile park homeowner's association filed suit against the association requesting an accounting. The homeowner's association responded that one of the residents was not entitled to the documents because she was an agent for the park owner. The homeowner's association and the park owner had been involved in litigation for 15 years and the association suspected that this resident was trying to gain access to its documents for the park owner's benefit.

As a result, the association moved to compel the resident to disclose information on her fee arrangements with her attorney and her accountant, as well as, an unredacted copy of an email sent from her attorneys to the park owner's attorneys. The resident filed a Motion for Protective Order and the trial court granted a Motion to Compel.

The Second District granted certiorari and quashed that portion of the order which related to disclosure regarding the information regarding fee arrangements between the resident and her attorney noting that the attorney client privilege is not concerned with the litigation needs of the opposing party and undue hardship is not an exception to its production nor is disclosure permitted because the opposing party claims that the privileged information is necessary to prove their case.

The Second District denied certiorari as to the unredacted email between her attorneys and the park owner's attorneys. Lastly, the Court concluded that the Court properly allowed the disclosure of the information on who hired the resident's accountant and the fees that were being paid. The resident had named the accountant as an expert in her case and "where the discovery sought is directed to a party about the extent of that party's relationship with a particular expert, the balance of the interest shifts in favor of allowing the pretrial discovery."

Attorney-Client Privilege – In Camera Inspection Required

RC/PB, Inc. v. Ritz-Carlton Hotel Company, LLC, 132 So. 3d 325 (Fla. 4th DCA 2014)

During discovery and litigation over a franchise agreement, RC/PB, Inc. asserted an attorney/client privilege to certain documents and prepared a privilege log. The Respondents argued that the privilege had been waived because the documents were either copied or addressed to third parties. The Petitioner then requested an *in-camera* inspection before ordering production. Despite acknowledging that there could be some privileged materials, the trial court ordered production of the materials listed in the privilege log without conducting an *in-camera* inspection.

The Fourth District quashed the trial court's decision and noted that the Petitioner had submitted the privilege log and an explanation of why the others were involved in the communication. Specifically, the communications were in furtherance of seeking legal advice. Therefore, the trial court was instructed to conduct an *in-camera* inspection and consider whether the communications would not have been made but for the contemplation of legal services; the employee making the communication did so at the direction of his corporate superior; the superior made the request of the employee as part of the corporation's effort to secure legal advice or services; the content of the communication related to the legal services being rendered; the subject matter of the communication was within the scope of the employee's duty; and the communication was not disseminated beyond those persons who, because of the corporate structure, needed to know of its contents.

Attorney-Client Privilege Protects Original Handwritten Interrogatory Answers

Montanez v. Publix Super Markets, Inc., 135 So. 3d 510 (Fla. 5th DCA 2014)

The Plaintiff sued Publix for injuries sustained in a slip and fall. In providing an answer to an Interrogatory regarding Publix's knowledge of the dangerous condition, her answer to Interrogatory stated "Defendant's responsibility is to maintain premises safe for the public. The liquid had been on the floor long enough that the Defendant should have discovered it." At her deposition, the

Plaintiff was asked about this answer. She responded that, although she had signed the answers to Interrogatories, the listed answer to this Interrogatory was not provided by her. She went on to testify that she did not know the length of time that the puddle had been present prior to her slip and fall.

Thereafter, Publix served a Request to Produce seeking the Plaintiff's original, hand written responses to Publix's Interrogatories. The Plaintiff objected on the grounds of attorney-client privilege, however, the trial court overruled this. The Fifth District granted certiorari and held that the draft answers delivered to her attorney were in fact attorney-client communications.

Authority to Enter into Arbitration Agreement

Zephyr Haven Health & Rehab Center v. Clukey, 133 So. 3d 1230 (Fla. 2d DCA 2014)

The nursing home appealed the trial court's denial of it Motion to Dismiss and to Compel Arbitration. The Second District reversed finding that the Personal Representative, acting under a durable power of attorney which stated that she could act on the decedent's behalf with respect to "claims and litigation" and "all other matters" had authority to enter into an Arbitration Agreement. It further held that the trial court erred in finding that the Arbitration Agreement was substantively unconscionable because the estate did not have the ability to pay the cost of arbitration.

Certiorari

Jilco, Inc. v. MRG of South Florida, Inc., 39 FLWD 2171 (Fla. 4th DCA 2014) **Has not been released for publication in permanent law reports.**

The parties went to Court ordered mediation and entered into a preliminary settlement agreement entitled "Memorandum of Mediation Results." The memorandum included a provision stating that the "parties contemplate executing more formal document to implement this agreement. However, if not done, this agreement shall be enforceable by the parties/courts." Paragraph A of the agreement provided that MRG's rent would be set at $31,000 per month and Paragraph B provided that the rent would always be $14,000 more than Jilco's rent to the owner of the property.

A few months after the agreement was signed, Jilco learned that its rent was being increased due to a property tax increase pass through by the property owner. Jilco then notified MRG that the rent under the sub-lease would be $33,995.71; $14,000 more than Jilco's new rent to the owner. MRG then filed a Motion to Enforce the Settlement Agreement asking the Court to enforce Paragraph A which set the rent amount at $31,000. Jilco argued that the increase was consistent with Paragraph B of the agreement and MRG ask that the agreement be rescinded or voided due to mistake or absence of a meeting of the minds. MRG then issued subpoenas and Jilco moved for protective order seeking a limit to discovery.

The trial court allowed discovery to proceed and the Fourth District granted certiorari finding the validity of the agreement before ruling on any request for discovery.

FCCI Commercial Insurance Company, Inc. v. Armour, 132 So. 3d 864 (Fla. 2d DCA 2014)

Armour initiated arbitration proceedings against the general contractor, the prior proper owner and 14 sub-contractors used to complete his residence. After the sub-contractors were dismissed from the arbitration proceedings, he filed a separate action against them in the Circuit Court. FCCI insured two of the sub-contractors. As a result, FCCI filed a separate declaratory action to resolve its duty to defend and indemnify the two sub-contractors under their insurance policies. The Circuit Court granted Armour's Motion to Stay the Declaratory Action after arguing that consideration of the policy provisions regarding FCCI's duty to defend and indemnify its insured's would involve the same factual disputes and issues raised in the Arbitration and liability actions. The trial court stayed both the declaratory judgment and the liability actions pending the resolution of the Arbitration action. FCCI then filed a Petition for Writ of Certiorari.

The Second District granted the petition and quashed the trial court's decision to stay the declaratory action, noting that the trial court's order would cause irreparable harm to FCCI by forcing it to defend its insureds without resolution of the coverage dispute.

Safeco Ins. Co. v. Rader, 132 So. 3d 941 (Fla. 1st DCA 2014)

Plaintiff sued his uninsured motorist carrier, Safeco, for UM benefits. He asserted that Safeco had tendered an unsatisfactory settlement offer. Safeco answered and averred that it previously tendered the full policy - $100,000. Safeco asserted that this tender operated as a confession of judgment as a matter of law and requested the court enter judgment for the plaintiff for the policy limits.

Plaintiff then moved to amend his complaint to add a bad faith action. The court granted Plaintiff's motion and denied Safeco's motion to enter final judgment in accordance with its confession of judgment. Safeco then filed a motion to remove to Federal court, which was denied as untimely. Safeco filed a writ of certiorari.

The First District denied the writ. Safeco could not meet the threshold element of a material injury that cannot be corrected on appeal. The First District reasoned that at most, Safeco would be delayed in its ability to remove the matter to Federal Court. If the order was reversed, Plaintiff would have to file a new, separate action for bad faith. Safeco could then remove the case and thus its removal right was not permanently deprived. Court also ruled that "showing your hand" at the first trial did not amount to irreparable harm.

GEICO General Insurance Company v. Paton, 133 So. 3d 1071 (Fla. 4th DCA 2014)

The trial court entered orders that permitted discovery of the billing records of GEICO's attorneys. The records were sought by the Plaintiff to support her claim for attorney's fees and specifically to support the award of a multiplier. The Fourth District reversed noting that "where the billing records of opposing counsel are sought solely for the purpose of supporting a claim for attorney's fees, the parties seeking production must establish that the requested material was actually relevant to a disputed issue, that the records sought are needed to prepare for the attorney's fee hearing, and that substantially equivalent material cannot be obtained by another source." In light of the fact that this discovery was only done to support the award of a multiplier, the Fourth District found that there was no basis for the discovery of these materials and granted certiorari.

Polselli v. Wicker Smith, 133 So. 3d 1172 (Fla. 4th DCA 2014)

The Respondent law firm sued the Petitioners individually, together with the business entities with which they were involved, for unpaid legal services. The law firm noticed the Petitioners to appear for deposition in their individual capacity. When the witnesses did not appear, the law firm filed a Motion to Compel and the trial court granted a Motion to Compel them to appear for deposition in Broward County, despite the fact that they were not seeking affirmative relief.

In a 2-1 decision, the Fourth District granted the Petition finding that because Wicker Smith failed to demonstrate that extraordinary circumstances existed and because the Petitioners were not seeking affirmative relief, they did not need to appear for deposition in Florida. In her dissent, Judge Warner stated that she would have dismissed the Petition as untimely because it was the original order which required the Petitioners to appear for deposition in Broward County which should have been appealed; not the order on the Motion to Compel when they did not appear following their first noticed deposition.

Lytal, Reiter, et al. v. Malay, 133 So. 3d 1178 (Fla. 4th DCA 2014)

In a motor vehicle accident case, the trial court ordered Plaintiff's law firm to "provide a list of all payments made to [the Plaintiff's treating physician] over the last three years" with all client/patient information to be redacted. The treating physician was expected to provide expert opinions at trial and the discovery encompassed all payments made in connection with the present litigation and past litigation.

The Fourth District denied the Petition for Certiorari noting that "a law firm's financial relationship with a doctor is discoverable on the issue of bias." At his deposition, the treating physician denied having any records and provided "nebulous testimony" in connection with the number of patients who were represented by this law firm. As such, the Fourth District concluded that this law firm was an appropriate source to obtain the information.

State v. Page-Martin, 135 So. 3d 491 (Fla. 2d DCA 2014)

Before a jury had been sworn in, the prosecutor requested to use his remaining peremptory challenges as back strikes even though the original jury venire had been dismissed. The trial court denied this request and the State filed a Petition for Certiorari. The Second District granted the Petition holding that it was a departure from the essential requirements of the law to deny the State's request noting that "parties may challenge a prospective juror at any time before the jury is sworn…a trial Judge has no authority to infringe upon a party's right to challenge any juror, either peremptorily or for cause, prior to the time the jury is sworn."

Montanez v. Publix Super Markets, Inc., 135 So. 3d 510 (Fla. 5th DCA 2014)

The Plaintiff sued Publix for injuries sustained in a slip and fall. In providing an answer to an Interrogatory regarding Publix's knowledge of the dangerous condition, her answer to Interrogatory stated "Defendant's responsibility is to maintain premises safe for the public. The liquid had been on the floor long enough that the Defendant should have discovered it." At her deposition, the Plaintiff was asked about this answer. She responded that, although she had signed the answers to Interrogatories, the listed answer to this Interrogatory was not provided by her. She went on to testify that she did not know the length of time that the puddle had been present prior to her slip and fall.

Thereafter, Publix served a Request to Produce seeking the Plaintiff's original, hand written responses to Publix's Interrogatories. The Plaintiff objected on the grounds of attorney-client privilege, however, the trial court overruled this. The Fifth District granted certiorari and held that the draft answers delivered to her attorney were in fact attorney-client communications.

State Farm Florida Insurance Company v. Coburn, 136 So. 3d 711 (Fla. 2d DCA 2014)

In this bad faith action, the Plaintiff made a request for documents which caused State Farm to file a Motion for Protective Order. The trial court denied the Motion for Protective Order. State Farm filed a Petition for Certiorari claiming that the trial court erred in failing to conduct an *in-camera* review to address their objections to the discovery request based upon the scope of the discovery requested and based upon attorney/client doctrine.

The Second District denied the motion noting that the general denial of the Motion for Protective Order constituted the functional equivalent of a determination that the documents were otherwise discoverable and, at that point, State Farm now had the ability to file a privilege log to point to specific documents which they claimed were privileged.

Tumelaire v. Naples Estates Homeowners Association, 137 So. 3d 596 (Fla. 2d DCA 2014)

A member of the mobile park homeowner's association filed suit against the association requesting an accounting. The homeowner's association responded that one of the residents was not entitled to the documents because she was an agent for the park owner. The homeowner's association and the park owner had been involved in litigation for 15 years and the association suspected that this resident was trying to gain access to its documents for the park owner's benefit.

As a result, the association moved to compel the resident to disclose information on her fee arrangements with her attorney and her accountant, as well as, an unredacted copy of an email sent from her attorneys to the park owner's attorneys. The resident filed a Motion for Protective Order and the trial court granted a Motion to Compel.

The Second District granted certiorari and quashed that portion of the order which related to disclosure regarding the information regarding fee arrangements between the resident and her attorney noting that the attorney client privilege is not concerned with the litigation needs of the opposing party and undue hardship is not an exception to its production nor is disclosure permitted because the opposing party claims that the privileged information is necessary to prove their case.

The Second District denied certiorari as to the unredacted email between her attorneys and the park owner's attorneys. Lastly, the Court concluded that the Court properly allowed the disclosure of the information on who hired the resident's accountant and the fees that were being paid. The resident had named the accountant as an expert in her case and "where the discovery sought is directed to a party about the extent of that party's relationship with a particular expert, the balance of the interest shifts in favor of allowing the pretrial discovery."

Florida Highway Patrol v. Bejarano, 137 So. 3d 619 (Fla. 1st DCA 2014)

The Plaintiff filed a lawsuit after being struck by a Florida Highway Patrol vehicle while walking along a road in Okaloosa County. At the time of the accident, the Plaintiff was an active duty United States Marine stationed nearby. After filing suit in Okaloosa County, the Plaintiff was transferred to a base in California; more than 2,000 miles away.

The Florida Highway Patrol set the deposition of the Plaintiff in Okaloosa County, however, after receiving the notice, the Plaintiff moved for protective order. The Plaintiff requested that he be allowed to appear for his deposition via video conferencing that he would arrange and pay for in order to limit work related hardships and the time and expense of traveling back to Okaloosa County.

The Highway Patrol opposed the motion, but the trial court ultimately granted the motion pursuant to its authority under Rule 1.280 to spare parties from undue discovery burdensomeness and expense and gave three reasons for its decision: the travel distance from California to Okaloosa County; the Plaintiff's active duty service in the Marines and his involuntary transfer to California; and, his willingness to pay the cost of the video conferencing and recording of the deposition.

The Court also reserved jurisdiction to determine whether the deposition's reporting and video were of sufficient quality, whether the Plaintiff ultimately would be required to appear in Florida before trial for an in-person deposition and whether either party could ultimately use the deposition for any purpose.

The Florida Highway Patrol filed a Petition for Certiorari which the First District denied finding that the granting of the protective order did not clearly cause material harm at this point in the proceedings and, further, that the order did not violate the essential requirements of the law. In fact, the law comported with the discretionary authority granted to trial courts to administer discovery.

Rodriguez v. Smith, 141 So. 3d 317 (Fla. 3d DCA 2014)

Smith allegedly suffered injuries as a result of an accident involving an automobile being driven by Franklin Martinez and a motorcycle being operated by Smith. Each blamed the other for causing the accident but only Smith sued for

damages. Smith sued Rodriguez and propounded discovery regarding Defendant's medical condition.

The trial court entered an order permitting discovery "regarding the Defendant's medical circumstances and injuries arising from this accident." In a 2-1 decision, the Third District refused to grant certiorari noting that "discovery of the nature and extent of Mr. Rodriguez's injuries caused by flying debris from the collision could be pertinent to Mr. Smith's proof regarding the location and force of the collision."

Maddox v. Bullard, 141 So. 3d 1264 (Fla. 5th DCA 2014)

Plaintiff filed a claim for damages which included a claim for mental anguish after having been bitten by the Defendant's dog. The trial court granted the Request for a Compulsory Psychological Examination, however, the order specified only the time, place and the name of the psychologist who would perform the examination. Plaintiff's counsel had asked the trial court to define the boundaries of the psychologist's examination, however, the trial court declined to do so. Specifically, it did not specify the manner, conditions, or the scope of the examination.

As a result, the Fifth District noted that this gave the psychologist "carte blanche" to perform any type and all manner of psychological inquiry, testing, and analysis of the Plaintiff for up to four continuous hours. Accordingly, the court granted the petition and noted that while the trial court could order the examination, it needed to specify the items requested by Plaintiff's counsel.

Gray v. Richbell, 144 So. 3d 573 (Fla. 4th DCA 2014)

In this motor vehicle accident case, Plaintiffs' expert theorized that the Defendant's age and physical condition contributed to causing the accident despite never having reviewed any of the Defendant's medical records. The Plaintiffs then sought and obtained the Defendant's medical records and deposed his treating physicians over his objection and Request for Protective Order.

Because of that discovery, the Plaintiff then requested a neurological examination of the Defendant. The Defendant objected and argued that his

medical condition had not been placed into controversy and that the Plaintiff had failed to show good cause for the examination.

Just prior to trial and with no action having been taken on the Defendant's objection to the IME, the Plaintiffs' expert opined that the Defendant was suffering from dementia at the time of the accident even though none of the Defendant's treating physicians had ever diagnosed him with this condition. Less than a week before trial, the trial court overruled the Defendant's objection and ordered him to undergo the examination. A Petition for Certiorari was filed and the Fourth District granted same noting that it was his conduct (i.e. whether he was negligent in failing to avoid a car that veered into his lane of traffic) that was at issue and not his mental or physical health.

Brana v. Roura, 144 So. 3d 699 (Fla. 4th DCA 2014)

The Defendants issued subpoenas to a hospital where Dr. Grabel performed spinal surgeries and sought "each and every document…to include all records, pertaining to [Dr. Grabel]." The trial court allowed these subpoenas to be issued over objection and the Fourth District granted certiorari and quashed the subpoena noting that the subpoenas would require the production of confidential medical records of Dr. Grabel's patients adding that the respondents failed to show compliance with Florida Statute §456.057(7)(a) which requires notice to patients whose medical records are sought before issuance of a subpoena for the records.

The Fourth District also granted certiorari and quashed the subpoenas issued to insurance carriers which required disclosure of financial information concerning payments made by those carriers to Dr. Grabel for services provided as a litigation expert. In doing so, they noted that "a subpoena may not be used to secure discovery of financial or business records concerning a litigation expert unless 'unusual or compelling circumstances' have been shown."

Sto Corp. v. Greenhut Construction Company, 146 So. 3d 534 (Fla. 1st DCA 2014)

Defendant failed to fully comply with an order compelling production. After a hearing on discovery violations, the Court entered sanctions deeming certain paragraphs of the Complaint admitted as a sanction. The Defendant filed a Petition for Certiorari and the First District denied same finding that an order deeming certain paragraphs of the Complaint admitted as a sanction for discovery

violation is not subject to certiorari review where the Petitioner had failed to demonstrate irreparable harm that could not be adequately addressed on appeal.

Bartow HMA LLC v. Kirkland, 146 So. 3d 1213 (Fla. 2d DCA 2014)

Bartow HMA was ordered to produce various documents based upon a discovery dispute. They filed a Petition for Writ of Certiorari which was denied. During the certiorari proceeding, the Plaintiff did not seek attorney's fees, nor were any attorney's fees authorized or awarded by the Appellate Court.

Following the denial of the Petition for Certiorari, the Plaintiff filed a renewed Motion to Compel and also sought the award of attorney's fees and costs associated with the filing of the motion and for other relief. The trial court granted the motion and ended up awarding attorney's fees including those incurred by the certiorari proceeding.

The Second District reversed the award of appellate attorney's fees because it did not authorize such an award. Further, they found that the argument that the Plaintiff's attorney's fees in defending the certiorari proceeding were incurred in obtaining the discovery material and were not appellate fees was devoid of merit.

Antico v. Sindt Trucking, Inc., 148 So. 3d 163 (Fla. 1st DCA 2014)

Following the filing of a lawsuit for damages related to a death from a motor vehicle accident, the trial court ordered that the Defendant's expert could inspect the decedent's cell phone data from the date of the accident where the Defendant's Motion to Inspect the Cell Phone was supported by specific evidence that the decedent was using a cell phone at the time of the accident. Moreover, the trial court provided specific protections for the data and limited the inspection to the time period in question. As such, the First District denied the Petition for Writ of Certiorari.

Rombola v. Botchey, 149 So. 3d 1138 (Fla. 1st DCA 2014)

In this motor vehicle accident case, Plaintiff was represented by the Block law firm. The Defendant was represented by attorney Winicki and Ahmed of the Kubicki Draper firm. Both Winicki and Ahmed actively participated in the defense of the case and a verdict was ultimately rendered against the Defendant in

the amount of $1,200,000. The Defendant then filed a post-trial motion seeking a new trial and Remittitur and Winicki and Ahmed were both listed on the signature block although Winicki signed the motion. Two months later, Ahmed resigned from Kubicki Draper and began to work for the Block firm.

Despite the obvious conflict of interest, the Block firm undertook no steps to ameliorate the problem such as getting a waiver from the Defendant or instituting safeguards to prevent the use of or sharing of confidential information gleaned from Ahmed's representation. As a result, the Defendant filed a Motion to Disqualify the Block firm from any further representation of the Plaintiff and the motion was accompanied by an Affidavit of Winicki that detailed the substantial degree of Ahmed's involvement on the Defendant's behalf and his access to confidential information before he switched firms.

The Block firm did not respond to the disqualification motion and instead filed a response in opposition to the pending motion for new trial/Remittitur. The response listed Ahmed as an attorney of record for the Plaintiff although Block signed the motion. As the First District pointed out "the filing created the anomaly of Ahmed now being counsel for both sides in the litigation." The trial court then issued a show cause order requiring a response on the disqualification issue and then ultimately issued an order disqualifying the Block firm and its employees "from any further representation of this Plaintiff regarding any further issues at the trial level regarding the trial of this case." The First District granted certiorari and ordered that the Block firm be disqualified from any further representation of the Plaintiff for whatever reason.

Markel American Insurance Company v. Baker, 152 So. 3d 86 (Fla. 5th DCA 2014)

Markel insured the Defendants in a motorcycle accident. Prior to suit being filed, it tendered its $10,000 policy limit to the Plaintiff; however, her attorney rejected the tender claiming it acted in bad faith by not timely resolving the claim. Thereafter, the Plaintiff filed suit against Markel's insureds. In the months leading up to trial, a dispute arose as to whether Markel had breached any duties of good faith owed to its insureds in the handling of this claim.

As a result, they filed a declaratory judgment action in Federal Court seeking a declaration that it had not committed bad faith and that it did not breach its duty

of good faith owed to its insureds. Before the State Court trial went forward, Markel and the parties entered into a *Cunningham* agreement by which the parties agreed to try the bad faith case first in Federal Court and stay the State Court case.

Based upon the *Cunningham* agreement, Markel agreed that if there was a judicial determination that it breached one or more of its duties of good faith owed to its insureds, it would pay the Plaintiff $400,000 and pay her attorney's fees and costs. Conversely, if the determination was that Markel did not breach one or more of its duties of good faith, then the $10,000 tendered to the Plaintiff would be accepted in full and final payment.

During the pendency of the Federal Court case, a dispute arose as to the scope of the agreement. The Plaintiffs had asserted that the parties did not agree to litigate a "full blown" bad-faith case, but rather, they only agreed to litigate whether Markel breached a single duty of good faith. In doing so, they argued that if they could show a breach of a single duty, then they would be the prevailing parties in the Federal Court action. By contrast, Markel argued that the agreement was not that narrow and that the parties agreed to litigate a traditional bad-faith case, with bad-faith being determined under the totality of the circumstances and standard set forth under Florida law.

The Federal Court did not resolve the meaning of the *Cunningham* agreement, but rather, ordered that the parties seek a determination in State Court regarding their respective rights and obligations, and the scope and meaning of the *Cunningham* agreement. Markel then filed a two-count Complaint in State Court for declaratory relief and for reformation of the *Cunningham* agreement.

The State Court allowed for discovery to proceed and the Plaintiff propounded discovery seeking all communications between Markel and their attorneys regarding the stipulation. They also scheduled the deposition of Markel's corporate representative and Markel filed a Motion for Protective Order asserting that all of the testimony being sought from the corporate representative was attorney/client privileged.

Markel also filed a Motion for Protective Order concerning the deposition of its lead counsel for the same reason. The trial court ultimately ruled that Markel had waived its attorney/client privilege, and at a later hearing, also ruled that the work product privilege had been waived. Markel filed a Petition for Certiorari.

The Fifth District granted certiorari. They stated that because Markel's intent was relevant to the issue of whether there was a mutual or unilateral mistake, it was incumbent to present evidence of their intent with regard to the *Cunningham* agreement. In argument on the Motion for Protective Order, Markel's counsel admitted that the attorneys involved in the *Cunningham* agreement needed to provide testimony with respect to intent; however, it was unnecessary to present evidence of privileged communications to establish this intent.

The Fifth District ruled that the filing of a reformation action, which involves a question of intent, does not automatically result in a waiver of attorney/client privilege. Further, they noted that the possibility that a party's statements concerning its intent in forming the contract could be impeached by confidential communications between that party and his attorney does not give the opposing party a right to have those confidential communications disclosed.

Brown v. Mittleman, 152 So. 3d 602 (Fla. 4th DCA 2014)

In this motor vehicle accident case, the Plaintiff's attorney referred her client to Dr. Brown who treated the Plaintiff under a letter of protection. Another law firm joined as Plaintiff's co-counsel and the Defendant subsequently subpoenaed the person with the most knowledge at Dr. Brown's office to produce documents regarding patients previously represented by both law firms, letter of protection cases and referrals from the Plaintiff's attorneys. The trial court overruled the objections and Dr. Brown filed a Petition for Writ of Certiorari arguing that Florida Rule of Civil Procedure 1.280(b)(5) prohibits the discovery and that the relationship with the second law firm is not discoverable because there is no evidence that the firm directly referred the Plaintiff to Dr. Brown.

The Fourth District denied the petition noting that the discovery was limited to a reasonable timeframe and was not overly intrusive and that the trial court had broad discretion to order production of documents regarding patients previously represented by the law firms, letters of protection cases and referrals from Plaintiff's attorneys in order to uncover an ongoing relationship between the doctor and the Plaintiff's lawyers which might, in turn, reveal bias.

Safeco Insurance Company v. Beare, 152 So. 3d 614 (Fla. 4th DCA 2014)

Safeco's insured sued the third party tortfeasor as a result of an accident. She settled her case and, thereafter, was granted leave to amend the Complaint to add her insurance carrier, Safeco, for her UM benefits and bad faith refusal to settle her claim. Safeco answered the uninsured motorist claim and moved to dismiss the bad faith claim as premature. Ultimately, the trial court abated the bad faith count. Safeco then filed a Petition for Certiorari claiming that it had been irreparably harmed by the denial of its Motion to Dismiss the Bad Faith Claim.

In so doing, they pointed out that the claim was an amendment to the original negligence suit which was filed more than one year prior to Safeco's joinder and thus, it prevented Safeco from removing the claim to Federal Court. While the Fourth District recognized that the inability to remove an action to Federal Court constitutes irreparable harm, they denied the Petition for Certiorari because Safeco had not shown that the trial court departed from the essential requirements of the law.

Doolittle v. Shumer, 152 So. 3d 779 (Fla. 5th DCA 2014)

The Plaintiff sued the Defendants, the owners of a dog that attacked him and his dog. A third Defendant, the dog walker, was also sued. Six weeks after one of the owners filed their Answer and Affirmative Defenses, she was criminally charged for actions arising from the same incident that gave rise to the civil action. She then filed a Motion to Abate the civil action until such time that she could testify without compromising her Fifth Amendment rights of self-incrimination.

The trial court abated the entire action until further order of the Court. The Plaintiffs then filed a Petition for Certiorari and the Fifth District granted same as it applied to the abatement as to the other Defendants. As to the Defendant claiming the Fifth Amendment right, the petition was denied without prejudice for the Plaintiffs to seek further relief if the trial court either indefinitely stayed the case against her or did not otherwise consider a less intrusive means to safeguard her Fifth Amendment privilege.

Conflict of Interest

Rombola v. Botchey, 149 So. 3d 1138 (Fla. 1st DCA 2014)

In this motor vehicle accident case, Plaintiff was represented by the Block law firm. The Defendant was represented by attorney Winicki and Ahmed of the Kubicki Draper firm. Both Winicki and Ahmed actively participated in the defense of the case and a verdict was ultimately rendered against the Defendant in the amount of $1,200,000. The Defendant then filed a post-trial motion seeking a new trial and Remittitur and Winicki and Ahmed were both listed on the signature block although Winicki signed the motion. Two months later, Ahmed resigned from Kubicki Draper and began to work for the Block firm.

Despite the obvious conflict of interest, the Block firm undertook no steps to ameliorate the problem such as getting a waiver from the Defendant or instituting safeguards to prevent the use of or sharing of confidential information gleaned from Ahmed's representation. As a result, the Defendant filed a Motion to Disqualify the Block firm from any further representation of the Plaintiff and the motion was accompanied by an Affidavit of Winicki that detailed the substantial degree of Ahmed's involvement on the Defendant's behalf and his access to confidential information before he switched firms.

The Block firm did not respond to the disqualification motion and instead filed a response in opposition to the pending motion for new trial/Remittitur. The response listed Ahmed as an attorney of record for the Plaintiff although Block signed the motion. As the First District pointed out "the filing created the anomaly of Ahmed now being counsel for both sides in the litigation." The trial court then issued a show cause order requiring a response on the disqualification issue and then ultimately issued an order disqualifying the Block firm and its employees "from any further representation of this Plaintiff regarding any further issues at the trial level regarding the trial of this case." The First District granted certiorari and ordered that the Block firm be disqualified from any further representation of the Plaintiff for whatever reason.

Corporate Representative

Racetrac Petroleum, Inc. v. Sewell, 150 So. 3d 1247 (Fla. 3d DCA 2014)

The Plaintiff was injured when her vehicle was struck as she exited from a gas station. The Plaintiff noticed the deposition of the corporate representative with the most knowledge regarding selection of locations for gas stations. Thereafter, the Defendant designated its appropriate representative.

During the course of her deposition, the corporate representative identified other corporate officers who were involved in the selection of location of the gas station. Plaintiff then moved to compel their depositions and the trial court granted same. The Third District upheld this decision noting that Florida Rule of Civil Procedure 1.310(b)(6) does not prevent a party from deposing officers not identified by the corporation in response to a Rule 1.310(b)(6) notice where the corporate designee testifies that other officers have same or similar knowledge.

Court is Not Required to Sua Sponte Order Evidentiary Hearing on Motion to Dismiss

Nieves v. Viera, 150 So. 3d 1236 (Fla. 3d DCA 2014)

Dr. Nieves is a board certified orthopedic surgeon and he performed surgery on the decedent. All agreed that the surgery was successful and the patient was doing well in the recovery room. Several hours later, after being administered pain medication by hospital nursing staff, she suffered a respiratory arrest. Four days later, she died.

During those four days, the hospital staff never called Dr. Nieves and Dr. Nieves never called upon the patient. He claimed he had no duty or obligation to the patient beyond checking on her in the recovery room and believed that, after that point, responsibility for the patient's care was with the nursing staff and staff physicians caring for her.

Dr. Nieves received a Notice of Intent which contained an Affidavit from a physician practicing pulmonology and internal medicine. Dr. Nieves moved to dismiss the Complaint filed against him on the ground that this physician did not practice in the same or similar specialty "that includes the evaluation, diagnosis or

treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients." It should be noted that this claim arose before the amendment to Florida Statute §766.102(5)(a)(1) which has since deleted the "similar specialty" language from the statute. After the trial court denied the Motion to Dismiss, Dr. Nieves filed a Petition for Certiorari.

The petition was denied. The Third District pointed out that Dr. Nieves claimed that the trial court's order should have been quashed because it failed to conduct an evidentiary hearing on his Motion to Dismiss. Notably, Dr. Nieves never requested an evidentiary hearing but rather, repeatedly argued that the Affidavit did not meet the requirements of the Statute "on its face." The Third District held that it was not a departure from the essential requirements of law for the trial court to fail to hold an evidentiary hearing on a Motion to Dismiss on the grounds that pre-suit conditions of filing suit had not been satisfied where an evidentiary hearing had not been requested.

Error to Compel Out-of-State Defendant to Appear for In-State Deposition

Polselli v. Wicker Smith, 133 So. 3d 1172 (Fla. 4th DCA 2014)

The Respondent law firm sued the Petitioners individually, together with the business entities with which they were involved, for unpaid legal services. The law firm noticed the Petitioners to appear for deposition in their individual capacity. When the witnesses did not appear, the law firm filed a Motion to Compel and the trial court granted a Motion to Compel them to appear for deposition in Broward County, despite the fact that they were not seeking affirmative relief.

In a 2-1 decision, the Fourth District granted the Petition finding that because Wicker Smith failed to demonstrate that extraordinary circumstances existed and because the Petitioners were not seeking affirmative relief, they did not need to appear for deposition in Florida. In her dissent, Judge Warner stated that she would have dismissed the Petition as untimely because it was the original order which required the Petitioners to appear for deposition in Broward County which should have been appealed; not the order on the Motion to Compel when they did not appear following their first noticed deposition.

Exculpatory Clauses

Diodato v. Islamorada Asset Management, Inc., 138 So. 3d 513 (Fla. 3d DCA 2014)

On August 20, 2009, the decedent and her husband signed a Release for a shallow reef dive. On the reverse side of the releases, the decedent and her husband initialed boxes stating "this Release is valid for one year from the date of this Release." They returned to the dive shop on April 14, 2010 and again, before the dive, they signed other Releases but did not initial the box providing for the one year operative period.

On the morning of April 15, 2010, which was the day the wife died, they arrived late and did not sign a Release. The dive they were supposed to go on that day was an open water wreck dive; a dive for which, according to the Plaintiff, dive industry standards dictated a particular form of Release must be used. In fact, the Defendant admitted that they used different Releases for these more advanced open water dives.

On the morning of the dive, the decedent showed apprehension about diving. The reason for her apprehension was not known, however, ocean swells were estimated between 4-5 feet. The dive instructor and the decedent's husband entered the water first. The decedent followed, but after only submerging to a depth of approximately 10 feet, she signaled to the dive instructor that she wanted to surface.

She surfaced with a dive instructor accompanying her, however, he did not help her on board the boat. She reached for and held onto the dive boat's granny line, but lost her hold and drifted away from the boat. The boat's captain sounded an alarm and after a brief search, she was found floating after having drowned.

The trial court granted Summary Judgment on the basis of the release signed in August, 2009. Having examined the release that was signed for the shallow dive, as well as the release that was intended to be obtained for the advanced open water dive, the Third District reversed noting once again that Courts disfavor and narrowly construe pre-claim exculpatory terms and releases.

Fraud on the Court

Bosque v. Rivera, 135 So. 3d 399 (Fla. 5th DCA 2014)

The Plaintiff filed suit for injuries sustained in a motor vehicle accident. In answering Interrogatories, the Plaintiff failed to disclose he had been involved in a prior accident in which he sustained a minor injury which required chiropractic care. He also answered falsely in deposition as to whether he had ever been involved in a prior automobile accident. The trial court dismissed the case for fraud on the court. The Fifth District reversed finding that the evidence did not establish, by clear and convincing evidence, that the Plaintiff engaged in a deliberate scheme to subvert the judicial process by failing to disclose his involvement in a prior accident or failing to disclose prior chiropractic treatment.

Guillen v. Vang, 138 So. 3d 1144 (Fla. 5th DCA 2014)

The trial court dismissed the Plaintiff's personal injury claim following a motor vehicle accident for fraud on the Court. Surveillance showed the Plaintiff performing activities that he allegedly claimed in his deposition that he could not perform. The Fifth District reversed finding that this did not constitute clear and convincing evidence sufficient to support dismissal with prejudice for fraud on the Court adding that the discrepancies between the testimony and the surveillance are best resolved by a jury.

Medicaid Lien

Harrell v. State of Florida, 143 So. 3d 478 (Fla. 1st DCA 2014)

Falling in line with the other District Courts of Appeal that have decided this issue since the U.S. Supreme Court's decision in *Wos v. E.M.A.*, 133 S. Ct. 1391 (2013), the First District held the Plaintiff must be given the opportunity to seek reduction of the amount of the Medicaid lien established by the statutory formula outlined in Florida Statute §409.910(11)(f) by demonstrating with evidence that the lien amount exceeds the amount recovered for medical expenses. Following the introduction of such evidence, the trial court must then consider this in making a determination on whether ACHA's lien amount should be adjusted.

Motion to Dismiss – Survival and Wrongful Death Actions as Alternative Claims

Randall v. Walt Disney World Company, 140 So. 3d 1118 (Fla. 5th DCA 2014)

In 2006, Randall and her husband visited Disney World and rode a rollercoaster which allegedly caused injuries to her husband's neck and head. In 2008, they filed a personal injury action with a loss of consortium claim. During the pendency of the personal injury action, Mrs. Randall's husband died. The parties disputed the cause of death as to whether it was a result of the injuries sustained on the rollercoaster or an unrelated cause.

In 2011, Mrs. Randall filed a Suggestion of Death but she failed to move to substitute herself as Personal Representative within 90 days of filing the Suggestion of Death to maintain the personal injury action. The trial court dismissed the personal injury action and the loss of consortium claim. Citing the Florida Supreme Court's recent decision in *Capone*, 116 So. 3rd 363 (Fla. 2013) which held that Florida's wrongful death act did not require dismissal of a pending personal injury action after a party Plaintiff's death and that a personal injury claim can be amended to add a wrongful death claim and substitute the Personal Representative of the estate as the party. Following this decision, the Fifth District reversed the trial court holding that the loss of consortium claim survives the death of the spouse-Plaintiff.

Motion for Sanctions – Strict Compliance with Rules to be Valid

Matte v. Caplan, 140 So. 3d 686 (Fla. 4th DCA 2014)

The Defendant believed that the Complaint filed against him was improper and sought attorney's fees pursuant to Florida Statute §57.105. In accordance with Florida Statute §57.105(4), the Defendant served a Motion to Dismiss on Plaintiff's counsel 21 days prior to filing his Motion to Dismiss the Complaint and Motion for Attorney's Fees. The Plaintiff did not dismiss the Complaint until after that time.

At the hearing on the attorney's fees motion, the Plaintiff objected to sanctions because the Defendant had failed to serve the motion in accordance with Florida Rule of Judicial Administration 2.516.

Specifically, the email did not provide a PDF of the motion or link to the motion on a website maintained by the Clerk; did not contain in the subject line in all capital letters, the words "SERVICE OF COURT DOCUMENT" followed by the case number, contained in the body of the email the case number, name of the initial party of each side, the title of each document served with that email and the sender's name and telephone number.

In this case, the email attached the motion in Word format instead of a PDF or link, the subject line failed to state "SERVICE OF COURT DOCUMENT" and contained a number that did not correlate with the circuit court case number; and the body of the email failed to contain any of the required information listed in sub section (ii) but simply said "see attached motion."

Because the granting of attorney's fees under the statute is in derogation of the common law, it must be strictly construed and the Fourth District affirmed the denial of the Motion for Sanctions for failure to properly comply with Judicial Administrative Rule 2.516.

Must Have Cognizable Basis to Add Non-Party as Judgment Debtor

Miccosukee Tribe of Indians of South Florida v. Bermudez, 39 FLWD 1395 (Fla. 3d DCA 7/2/14)

Bermudez's wife was killed and he and his son were injured in a motor vehicle accident in which Tammy Billie was driving a car owned by Jimmie Bert. A judgment was entered against Billie and Bert following trial. The Miccosukee Tribe was not a party when the final judgment was entered. The Plaintiffs had yet to collect the judgment because Billie and Bert assert that they had no assets.

Several years after the first final judgment was entered, Bermudez filed a Motion to add the Tribe as a judgment debtor in the matter because the Tribe had funded and guided Billie and Bert's defense in the lawsuit. The trial court granted the motion, however, the Third District reversed finding that there was no cognizable basis to add the Tribe as a judgment debtor.

Order Striking Fraudulent Settlement Requires Specific Findings

Florida Philharmonic Orchestra v. Bradford, 145 So. 3d 892 (Fla. 4th DCA 2014)

Bradford sued the Florida Philharmonic and his counsel negotiated a $280,000 settlement without Bradford's knowledge or consent. The Settlement Agreement was fraudulently signed and the case was dismissed. Seven months later, Bradford (through new counsel) filed a Motion to Set Aside the Settlement Agreement and Strike the Order Dismissing the Action with prejudice. Bradford alleged that he never authorized the settlement with the Philharmonic; that his counsel submitted a false release on his behalf; and this his prior counsel admitted that his actions were unauthorized and unlawful.

At the hearing on the Motion to Set Aside the Settlement Agreement, Florida Philharmonic emphasized that Bradford had given his counsel to settle his case for $900,000 and that he acted with apparent authority when he negotiated the settlement without his client's permission. In the event that the trial court decided to set aside the settlement, Florida Philharmonic requested a set off for the money it already paid. The trial court entered an Order striking the dismissal of the underlying case and reserved ruling on the set off.

The Fourth District reversed and held that it was error for the trial court to simply strike the dismissal without making specific findings as to which party bore the burden of prior counsel's fraud. The Fourth District directed the trial court to determine: (1) whether the Plaintiff demonstrated due diligence in hiring the attorney; (2) whether the attorney had actual or apparent authority to settle the case; (3) whether the Defendant knew or should have known that the proposed settlement was suspect; (4) whether the Plaintiff demonstrated due diligence upon discovering the fraud; and (5) whether the Plaintiff ratified the fraud.

Privilege Log Not Required Until Determination that Otherwise Discoverable

State Farm Florida Insurance Company v. Coburn, 136 So. 3d 711 (Fla. 2d DCA 2014)

In this bad faith action, the Plaintiff made a request for documents which caused State Farm to file a Motion for Protective Order. The trial court denied the Motion for Protective Order. State Farm filed a Petition for Certiorari claiming

that the trial court erred in failing to conduct an *in-camera* review to address their objections to the discovery request based upon the scope of the discovery requested and based upon attorney/client doctrine.

The Second District denied the motion noting that the general denial of the Motion for Protective Order constituted the functional equivalent of a determination that the documents were otherwise discoverable and, at that point, State Farm now had the ability to file a privilege log to point to specific documents which they claimed were privileged.

Posting to Online Docket Does Not Constitute Service

Courtney v. Catalina, Ltd., 130 So. 3d 739 (Fla. 3d DCA 2014)

It was error to deny a motion to vacate a final order of dismissal for want of prosecution where the movant did not receive service of the notice of inactivity. Postings to an online court docket are not encompassed by the permissible methods of service set forth in Florida Rule of Judicial Administration 2.516.

Proposal for Settlement

Patel v. Nadigam, 39 FLWD 1233 (Fla. 2d DCA 2014) **Not released for publication in permanent law reports – still subject to revision and or withdrawal**

It was error to award attorney's fees pursuant to an offer of judgment in an action that sought both damages and equitable relief. Nevertheless, the Second District concluded that attorney's fees were appropriately awarded pursuant to Florida Statute §44.103(6)(a). That section provides that attorney's fees may be assessed against a plaintiff who seeks a *de novo* trial after the entry of an arbitration order if the plaintiff obtains a judgment at trial which is at least 25% less than the arbitration award. Citing the statute's intent to avoid baseless filings of motions for *de novo* trial, the Second District disagreed with Plaintiff's argument that he received a zero recovery at both arbitration and trial – thus the statutory formula was not met.

Citizen's Property Insurance Corp. v. Perez, 39 FLWD 1271 (Fla. 4th DCA 2014) **Not released for publication, until then subject to revision or withdrawal.**

The homeowner submitted a claim almost 4 years after the date of loss. After notifying Citizen's of the loss, they asked the insured to provide a "sworn proof of loss" containing certain information regarding his home and the alleged damage. Although the insured submitted some of the requested information to Citizen's, he did not do so in a timely manner.

Perez then filed suit after Citizen's denied his claim. An initial Summary Judgment filed by Citizen's was denied. Thereafter, they served Perez with a Proposal for Settlement in the amount of $1,000 which he rejected. They then filed a second Motion for Summary Judgment which was granted. Following the granting of the Summary Judgment, Citizen's filed a Motion to Determine its Entitlement to Attorney's Fees. The trial court denied Citizen's request for attorney's fees finding that the settlement offer was not made in good faith.

The Fourth District reversed and ruled that the trial court followed the wrong standard in determining whether the Proposal for Settlement was made in good faith. The trial court relied upon a Third District case, *Event Services America, Inc. v. Ragusa*, 917 So. 2d 882 (Fla. 3d DCA 2005). In *Ragusa*, the Third District stated that "a reasonable basis for a nominal offer exists only where the undisputed record strongly indicates that the Defendant had no exposure in the case." By contrast, the rule in the Fourth District is that "a minimal offer can be made in good faith if the evidence demonstrates that, at the time it was made, the offeror had a reasonable basis to conclude that its exposure was nominal."

Padru v. Klinkenberg, 40 FLWD 41 (Fla. 1st DCA 2014)

Following a motor vehicle accident, the Plaintiff sued the driver and the owner of the vehicle. The Plaintiff served her proposal for settlement on the driver which provided that the Plaintiff would dismiss the action both against the driver and the owner after the driver tendered the proposed settlement amount. Following the trial, the jury returned a verdict substantially in excess of the proposal for settlement. The trial court granted the attorney's fees, however, the First District reversed saying that the proposal deprived the driver of the ability to evaluate and independently act to resolve the case against her.

Ekonomides v. Abou Sharaka, 133 So. 3d 1174 (Fla. 2d DCA 2014)

In a malicious prosecution action, Ekonomides filed a Proposal for Settlement which stated in part that he would pay $100 to settle this action "payable within 10 days of entry of the Order of Dismissal with Prejudice." The tenant argued, amongst other things, that this paragraph was ambiguous because the offer makes an illusory promise to pay only after the case was dismissed with prejudice arguing that if Ekonomides failed to pay the $100, the trial court would not have jurisdiction to enforce the settlement agreement after entry of the Order of Final Dismissal. The Second District disagreed and noted that the paragraph was not ambiguous because the trial court would have continuing jurisdiction to enforce the settlement had the Proposal been accepted because the Offer of Judgment statute provides that "upon filing of both the offer and acceptance, the Court has full jurisdiction to enforce the Settlement Agreement."

State Farm Insurance Company v. Reyes, 137 So. 3d 1123 (Fla. 3d DCA 2014)

State Farm filed a nominal Proposal for Settlement and then received a final summary judgment in its favor. The trial court entered an Order denying the motion for attorney's fees without any specific basis for the denial. A transcript of the hearing on the motion indicated that the Plaintiffs argued that the Proposals for Settlement were nominal and in bad faith and that State Farm had made similar nominal offers on "late filed" Hurricane Wilma claims in 68 other cases.

An 18 minute hearing on the motion consisted of argument of counsel and there was no opportunity to assess the particular facts of the other 68 cases. On the face of this record, the Third District found that there was no bad faith in State Farm's proposal and no determination of bad faith by the trial court. Therefore, they reversed with directions to enter an award granting State Farm its reasonable attorney's fees and costs.

Matthis v. Cook, 140 So. 3d 654 (Fla. 5th DCA 2014)

One of multiple Defendants filed a Proposal for Settlement. In the body of the Proposal for Settlement, it stated that one Defendant would be released if releases were signed whereas the releases attached to the proposal stated that all three Defendants would be released if they agreed to the proposal. Specifically, Cook's proposal stated that he was making the offer and, as a condition of

settlement, the remaining Defendants would be required to be released. The releases also clearly identified the rights that the Plaintiffs would be giving up if they agreed to the Proposal for Settlement. The Fifth District concluded that the proposals were not ambiguous and, therefore, were enforceable.

R.J. Reynolds Tobacco v. Ward, 141 So. 3d 236 (Fla. 1st DCA 2014)

The Plaintiff filed a Proposal for Settlement. As to punitive damages, each offer stated "punitive damages are included in the amount of this proposal, whether pled or unpled. Acceptance of this proposal will extinguish any present or future claim for punitive damages." Because the statute and the rule require the offeror to state with particularity the amount proposed to settle any claim for punitive damages whenever such a claim exists, and because there were claims for punitive damages pending against the Defendants when the offer was made, the First District found that the Plaintiff was not entitled to attorney's fees pursuant to the Offer of Judgment statute even though it was clear the punitive damages would have been extinguished had Defendants accepted the offers. In doing so, the First District stated that the appropriate test for Proposals for Settlement mandate strict compliance with the rule and statute and not an absence of ambiguity.

Arce v. Wackenhut Corporation, 146 So. 3d 1236 (Fla. 3d DCA 2014)

Following entry of a Summary Judgment, Wackenhut filed a motion for an award of attorney's fees and costs pursuant to a Proposal for Settlement which was not accepted. The trial court granted their Motion for Attorney's Fees. Following an appeal, the Third District remanded the case to the trial court to fix the amount of attorney's fees and costs. On remand, the trial court set aside its entitlement order finding that the Proposal for Settlement was not made in good faith. The Third District reversed noting that once the District Court had awarded appellate attorney's fees, the issue of good faith could not be raised for the first time at the hearing to fix the amount of fees.

DFC Tamarac, Inc. v. Jackson, 151 So. 3d 64 (Fla. 4th DCA 2014)

Defendant served a Proposal for Settlement on the Plaintiff. The proposal tracked the same language used by the Plaintiff in the Complaint and stated that the offer was being made to "Plaintiff, Fotou N. Jackson, a minor, by and through her mother and guardian, Coumba Jackson, individually." The Plaintiff did not accept

the offer and following a defense verdict, the Defendant sought attorney's fees and costs. The trial court found that the Proposal for Settlement was ambiguous as to the identity of the offeree and denied attorney's fees. The Fourth District reversed finding that the minor was the only Plaintiff herein and that the mother was only acting as her guardian.

Scherer Construction v. The Scott Partnership, 151 So. 3d 528 (Fla. 5th DCA 2014)

The Fifth District ruled that it was error to award fees to a Defendant pursuant to a Proposal for Settlement for a count which was voluntarily dismissed without prejudice before any determination of liability had been reached on that count.

Duong v. Ziade, 153 So. 3d 354 (Fla. 4th DCA 2014) **Not released for publication in permanent law reports – still subject to withdrawal or revision**

Following an adverse verdict against the Defendant, Plaintiff moved for an award of fees pursuant to a Proposal for Settlement. The Defendant opposed the award arguing that the proposal was ambiguous because it was an "all or nothing offer" which did not allow him to settle the claims of individual Plaintiffs. In this case, the mother, acting as plenary guardian, brought a medical malpractice claim on behalf of her son and his minor children. The proposal was for a total of $1,000,000 and provided that $900,000 was as to the incapacitated son and $50,000 each went to his two children.

The Fourth District upheld the award of attorney's fees noting that this case involves an offer to a single offeree conditioned on that single offeree accepting the offers as to all the multiple offerors. They added that because it was an all or nothing proposal, if the verdict for any of the Claimants was not 25% higher than the amount of that claimed in the settlement proposal, then none of the Claimants could obtain attorney's fees under its terms. In other words, it is not enough that the total amount of the verdict exceed the total amount of the offer by 25%, but the individual amounts awarded each Claimant must also exceed the individual amount set forth in the proposal for settlement by 25%.

Hilton Hotels Corp. v. Anderson, 153 So. 3d 412 (Fla. 5th DCA 2014)

Plaintiff was the victim of a criminal attack at a hotel. The victim and his wife filed a claim against the hotel and related companies. The Plaintiffs filed a proposal for settlement which stated in part "in exchange for [amount demanded] in hand paid from [Defendant], Plaintiff agrees to settle any and all claims asserted again [Defendant] as identified in [trial court case number]. "Following a verdict for the Plaintiff, a Motion for Attorney's Fees was filed which the trial court denied. The Fifth District affirmed finding that the language of the proposal was vague and ambiguous because it could not be determined whether the demands were intended to resolve only the husband's claims or the claims of both Plaintiffs.

Proposal for Settlement – No Attorney's Fees for Work Prior to Proposal

Mills-Tel Corp. v. Kattour, Inc., 143 So. 3d 939 (Fla. 3d DCA 2014)

Following an award of attorney's fees and costs pursuant to a Proposal for Settlement, the Third District reversed that portion of the Order which awarded attorney's fees for attorney time which pre-dated the Proposal for Settlement service date.

Release Language Changed Terms of Settlement

Thompson v. Maurice, 150 So. 3d 1183 (Fla. 4th DCA 2014)

Prior to suit being filed following a death secondary to a motor vehicle accident, the Plaintiff's estate made a demand to settle the case with specific terms and conditions. GEICO's responsive letter mirrored the four settlement conditions set out in the Plaintiff's demand letter, however, the letter went on to state that it was enclosing a release of all claims. The release contained very broad indemnification language which required the Plaintiff to indemnify and hold harmless GEICO and its insureds for any liens, derivative claims, etc.

The trial court granted Summary Judgment in favor of the Defendant finding that there was a settlement, however, the Fourth District reversed finding that GEICO's response to the demand letter did not constitute an acceptance, but rather, constituted a counter offer where the Defendant conditioned its acceptance upon

execution of a release and introduced broad indemnification language thereby injecting a new "essential element of the agreement" into presuit negotiations.

Sanctions Order Requires Specific Findings

Scott v. Reflections of Sebastian, LLC, 133 So. 3d 1046 (Fla. 4th DCA 2014)

Reflections filed a complaint against Scott. Scott filed a *pro se* answer but obtained counsel during discovery. After Scott failed to comply with several discovery deadlines in a pre-trial order, Reflections moved for sanctions. Neither Scott nor his counsel attended the hearing on the motion and, following the hearing, the trial court barred Scott from presenting any evidence or witnesses at trial. The Court ruled that Scott could testify on his own behalf if he allowed himself to be deposed by a certain date. The Court did not find that Scott had acted willfully or contumaciously in failing to comply with the pre-trial order.

A few weeks later, and shortly before trial, Scott obtained new counsel. He moved to continue the trial and to vacate the sanctions due to excusable neglect contending that the missed discovery deadlines had been the fault of his prior counsel. Scott also asserted that his prior counsel failed to inform him of the sanctions hearing or the resulting order.

When the parties appeared for trial, the Court denied the continuance and did not allow Scott to present any evidence in support of his Motion to Vacate. The Court also ruled that Scott could not testify on his own behalf finding that he had not presented himself for deposition by the deadline set forth in its prior order. This ruling was based on assertions by Reflections'counsel who contended that Scott had made himself available only on the Court ordered deadline, knowing that Reflections'counsel was unavailable on that date. Scott's counsel asserted that he did not know of that unavailability because it had been communicated only to Scott's prior counsel.

The court did not hear any evidence on these issues but proceeded with trial and entered final judgment for Reflections. The final judgment contained a finding that Scott's failure to provide discovery and appear for deposition were "willful, deliberate and contumacious and without reasonable justification for non-compliance." The Fourth District reversed because the trial court's original sanctions order did not find that Scott's failure to meet discovery deadlines was

willful or contumacious. Although the Court made a finding of willfulness in its final judgment, the finding was not supported by any evidence in the record and was contrary to Scott's assertions of neglect by his former counsel. There was also no evidence to support a finding that Scott's failure to present himself for deposition was willful. For all these reasons, the trial court's sanctions order was reversed.

Statute of Limitations – Sovereign Immunity

Exposito v. University of Miami School of Medicine, 141 So. 3d 633 (Fla. 3d DCA 2014)

A premature infant was born at Jackson Memorial Hospital on July 11, 2005, who now suffers from seizures, cerebral palsy, spastic quadriplegia, cortical blindness and brain damage. On July 6, 2009, the attorneys for the mother sent written notice to the Public Health Trust, the Florida Department of Financial Services and others pursuant to Florida Statute §768.28(6). On July 10, 2010, she filed her Complaint alleging malpractice by the Defendants.

The original and Amended Complaint included allegations regarding conditions precedent, to-wit: "all statutorily required conditions precedent to the maintenance of this action have been performed, have occurred, or have been waived. Plaintiffs have complied with all the requirements of applicable Florida Statutes, prior to the filing of this action." Specific compliance with the sovereign immunity statute, Florida Statute §768.28(6), was not separately alleged, although the proposed Second Amended Complaint would have added such an allegation and would have attached copies of the statutory notices of claim and return postal receipts.

After a determination that the claim was not barred by NICA, the trial court heard argument on Defendants' Motions to Dismiss which included that the claim was barred by the statute of limitations because Plaintiff failed to comply with the sovereign immunity statute by not filing her Notices of Claim within three years of the incident. The trial court found these arguments to be persuasive; however, the Plaintiff was allowed to file a Motion to Amend with a proposed Second Amended Complaint which included copies of the statutory notices and return receipts. The trial court ultimately granted the Motion to Dismiss and denied the Motion to Amend.

The Third District reversed and found that the original pleading of performance of the conditions precedent was sufficient although the Court noted a Second District decision which upheld the dismissal of the Complaint which did not specifically allege compliance with Florida Statute §768.28. See *Wright v. Polk County Public Health Trust Unit,* 601 So. 2d 1318 (Fla. 2d DCA 1992). The Third District stated that this issue did not need to be addressed, however, because the proposed Second Amended Complaint proffered the actual notices.

The Third District also found that when the three year time period in Florida Statute §768.28 began to run is a mixed factual and legal question. Lastly, the Third District noted that a defense based on accrual and alleged untimeliness whether under Florida Statutes §768.28 or §95.11 should be pled as an affirmative defense and is not appropriate for disposition on the face of a Complaint.

Summary Judgment

Denniser v. Columbia Hospital Corp. of South Broward, 39 FLWD 990 (Fla. 4th DCA 2014) **Opinion has not been released for publication and still subject to revision or withdrawal. Most recent reporter's oldest case is June 2014, so not sure this will be published**

The Plaintiff's mother was a patient in the hospital. During one visit, the Plaintiff went in to a kitchen through a closed, unlocked door, to get some tea. Inside the kitchen area, she allegedly slipped and fell on the wet floor causing injury. She sued the hospital claiming that she was an invitee.

In a Motion for Summary Judgment, the hospital's risk manager testified by way of Affidavit that the subject kitchen area was for use only by the employees and staff of the hospital and was "not to be used by patients and/or visitors of the hospital." A sign posted on the wall next to the entry door read "Pantry" and "Staff Only." There was no evidence that the Plaintiff was ever given permission to enter the kitchen.

The hospital moved for Summary Judgment arguing that the Plaintiff lost her status as an invitee and became an uninvited licensee or trespasser by going into an area of the hospital that was beyond the scope of her invitation. As such, the hospital argued that it was required to warn the Plaintiff of concealed dangers

only if her trespass was discovered. The hospital denied that any employee was aware of the Plaintiff's presence in the kitchen before she fell.

The trial court granted Summary Judgment and the Fourth District affirmed the finding that the Plaintiff was an uninvited licensee or trespasser because there was no evidence to the contrary. Summary Judgment was, however, reversed because there was no sworn evidence in the record to support the motion. Specifically, pages of the deposition relied upon in the Summary Judgment were not attached to the motion nor included within the record on appeal.

Bush v. State Farm Mutual Automobile Insurance Company, 39 FLWD 1575 (Fla. 2d DCA 2014) **Has not been released for publication.**

The Plaintiff filed a claim for uninsured motorist benefits. After receipt of the Complaint, State Farm served a Notice of Examination by an orthopedic surgeon. The Plaintiff objected to the notice and demanded various protections. State Farm advised that it did not agree to her demands and when the time came for the examination, she failed to appear.

Thereafter, State Farm added a defense of "no coverage" to its pleadings and filed a Motion for Summary Judgment arguing that because the Plaintiff breached a policy term, she forfeited coverage. The Plaintiff responded that Summary Judgment was improper because her failure to submit to the examination did not prejudice State Farm or warrant the denial of coverage. The trial court then entered Summary Judgment.

Relying upon the Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014), the Second District held that a Compulsory Medical Examination provision in the UM context is a post-loss obligation of the insured and is not a condition precedent to coverage. Thus, it was error to enter Summary Judgment.
Antonelli v. United Auto. Ins. Co., 133 So. 3d 1007 (Fla. 3d DCA 2014)

The Third District affirmed summary judgment finding no coverage for any bodily injury claims arising out of an accident. The commercial policy had a named driver exclusion provision and the driver was not named. The Third District reversed summary judgment finding no personal injury protection or property

damage coverage under the policy because those coverages are statutorily mandated.

O'Malley v. Ranger Const. Indus. Inc., 133 So. 3d 1053 (Fla. 4th DCA 2014)

Trial court incorrectly granted summary judgment on basis of stacking of inferences. Defendant took one inference, that standing water caused the accident, and attempted to stretch in into multiple inferences. Where there is only one inference related to causation, the summary judgment non-movant does not have to establish that the sole inference is the only reasonable inference.

The court also discussed the *Voelker* exception to the rule against stacking of inferences – when a predicate inference is the only reasonable inference that can be made from the evidence, it is no longer an inference but is deemed an established fact. Finally, the court explained that summary judgment should not be granted based on a non-movant's failure to meet its trial burden of proof on the issue of causation.

Harper v. Wal-Mart Stores East, LP, 134 So. 3d 557 (Fla. 5th DCA 2014)

The Plaintiff fell at a Wal-Mart store and brought suit against the store. Wal-Mart filed a Motion for Summary Judgment supported by two affidavits. The Plaintiff then deposed the two affiants and, shortly thereafter, Wal-Mart withdrew one of the affidavits because they had no relevant personal knowledge of the issues in dispute. Wal-Mart then filed a new affidavit from a witness who was employed by a Wal-Mart contractor. This witness' identity was not known until this affidavit was filed in support of the Motion for Summary Judgment.

Plaintiff promptly attempted to arrange the deposition of this newly disclosed witness and told Wal-Mart that he would seek to continue the summary judgment hearing if the deposition could not be arranged. When the deposition could not be arranged at a mutually convenient time, the Plaintiff filed a Motion to Continue the hearing and the trial court denied same.

In reversing, the Fifth District ruled that the trial court had abused its discretion in not continuing the hearing even though it agreed that, after a Motion for Summary Judgment is filed and scheduled, the non-moving party cannot delay the summary judgment hearing by initiating discovery. Here, however, this general rule did not apply because the pending discovery was not scheduled to

thwart the summary judgment hearing but was based upon a newly identified witness.

Rodriguez v. Security National Insurance, Co., Inc., 138 So. 3d 520 (Fla. 3d DCA 2014)

The Third District affirmed summary judgment in favor of an insurer in an action for breach of contract and bad faith in denying coverage to an insured. Rodriguez brought a wrongful death action against the insured stemming from an auto accident. The insured entered into a *Coblentz* agreement with Rodriguez and agreed to a consent judgment of $2.5 million in exchange for assigning his rights to a claim against the insurer. The insured's policy had lapsed 2 months prior to the accident.

Rodriguez argued that the insurer failed to give the insured notice that the policy would expire. The insurer sent notices to the address listed on the policy application and declarations page, but the address did not list the apartment number.

Without deciding whether the insurer had a statutory obligation to provide notice, the Third District held that the insurer gave sufficient renewal notice. Florida Statute §627.728(5), which deals with notices of cancellation and of intention not to renew, states that proof of mailing to the insured's address shown in the policy shall be sufficient proof of service. Similarly, the Policy required such notices to be mailed to the "address shown in our records." The Third District also noted that an insurer's proof of mailing of a notice of cancellation to the insured prevails as a matter of law over the insured's denial of its receipt.

Feris v. Club Country of Fort Walton Beach, Inc., 138 So. 3d 531 (Fla. 1st DCA 2014)

The First District reversed entry of final summary judgment in favor of Club Country in a slip and fall case. Feris slipped on the dance floor on what he believed was alcohol. He testified that other patrons were drinking on the dance floor, that he did not have a drink in hand when he fell, that he felt a liquid substance that smelled of alcohol, and that he did not know how long the substance had been on the floor. Others' testified to the effect that it was normal for patrons to bring drinks on the dance floor. The trial court entered summary judgment on the basis of §768.0755, Florida Statute, which places the burden on the plaintiff to establish

the defendant's actual or constructive knowledge of the dangerous condition. This statute was enacted after Feris' fall. Feris argued that §768.0710, Florida Statute, applied.

The First District found that §768.0755 did not apply retroactively, a decision in conflict with the Third District's holding in *Kenz v. Miami Dade County*, 116 So. 3d 461 (Fla. 3d DCA 2013). Regardless, Feris met his burden of proof to survive summary judgment under either statute. His testimony presented circumstantial evidence from which a jury could infer that Club Country or its agents allowed or caused a dangerous condition to exist, or that this condition existed with such regularity that Club Country knew or reasonably should have known of its existence.

Trabulsy v. Publix Supermarket, Inc., 138 So. 3d 553 (Fla. 5th DCA 2014)

While Trabulsy was shopping in Publix, he momentarily left his grocery cart unattended. Blanton, a store employee, noticed the unattended cart and assumed it had been abandoned. He retrieved the cart and began to re-shelve the items. When Trabulsy discovered that his cart had been moved, he confronted Blanton and the two got into an altercation that culminated with Blanton shoving Trabulsy, thereby causing him to fall to the floor. The two gave conflicting accounts of the dispute; both claiming that the other was the aggressor.

The trial court granted Summary Judgment; however, the Fifth District reversed. In doing so, they noted that "conduct is within the scope of employment, if it occurs substantially within authorized time and space limits, and is activated at least in part by a purpose to serve the master. The purpose of the employee's act, rather than the method of performance thereof, is said to be the important consideration."

Adding that the record could support the conclusion that Blanton did not act in self-defense, but instead overreacted to Trabulsy's complaint, the Fifth District pointed out that a jury, if it accepted this version of the facts, could still conclude that Blanton's loss of control was motivated by his purpose to serve Publix. "In other words, although his method might have been inappropriate, his purpose was, nevertheless, to serve his employer."

Adams v. Bell Partners, Inc., 138 So. 3d 1054 (Fla. 4th DCA 2014)

Adams was injured in a car accident by a rental car paid for by Bell Partners ("Bell") and authorized for an employee but driven by the employee's husband. Adams sued Bell under the dangerous instrumentality doctrine. Bell Partners filed a motion for summary judgment that it did not consent to the husband driving the vehicle, and that company policy prohibited unauthorized drivers and personal use of rental vehicles.

Three days before the hearing, Bell filed a supplemental memorandum in support raising the arguments that it did not have an identifiable property interest in the vehicle under ownership or bailment and that it did not exercise control over the vehicle. The trial court granted summary judgment finding it was undisputed that Bell did not own, lease, or rent the vehicle.

The Fourth District reversed on grounds that there were issues of fact of whether there was a bailment relationship and if the husband's use constituted conversion. It was also improper to grant summary judgment on grounds raised for the first time 3 days before the hearing. A court errs when it enters summary judgment upon a ground not raised in the initial summary judgment motion or at least 20 days before the hearing.

Granicz v. Chirillo, 147 So. 3d 544 (Fla. 2d DCA 2014)

The decedent had a history of depression and was seeing Dr. Chirillo, her primary care physician, who treated her for depression. The decedent was taking Prozac when she began seeing Dr. Chirillo and he switched her to Effexor. Unbeknownst to Chirillo, the decedent stopped taking the Effexor in June/July of 2008 because of its side effects.

In October, 2008, the decedent called Chirillo's office and spoke to his medical assistant and advised that she had not felt right since late June/July. She reported that she was under mental strain and was not sleeping well and was taking more sleeping pills. She attributed these problems to the Effexor and she told the assistant she stopped taking it.

The assistant wrote this information in a note to Dr. Chirillo. He read the note and then decided to change the decedent's anti-depressant to Lexapro. Chirillo's office called the decedent and told her she could pick up samples of

Lexapro, along with a prescription. They did not request that the decedent schedule an appointment with the doctor. The decedent picked up the samples and prescription later that day and the following day she hung herself.

The Plaintiff sued Chirillo for breaching his duty to exercise reasonable care in the treatment of the decedent. The Defendant filed a Motion for Summary Judgment arguing that Chirillo had no duty to prevent the decedent from committing an unforeseeable suicide. The Second District reversed and held that the proper inquiry the trial court should have conducted was to determine whether the Defendant's conduct created a foreseeable zone of risk; not whether Defendant could foresee the specific injury that actually occurred. In so doing, they certified conflict with the First District's decision in *Lawlor v. Orlando*, 795 So. 2d 147 (Fla. 1st DCA 2001).

VMS, Inc. v. Alfonso, 147 So. 3d 1071 (Fla. 3d DCA 2014)

VMS entered into a contract with the Florida Department of Transportation to maintain and manage portions of different roadways. Pursuant to that contract, VMS was obligated to secure worker's compensation insurance. It is undisputed that they did so. VMS then subcontracted work to ABC. The contract required ABC to secure worker's compensation insurance and they did so.

Thereafter, ABC hired Lazaro Contreras to perform some of the work that ABC had obligated itself to do. Contreras then hired day laborers including Alfonso to complete the work. While performing work covered by the VMS/ABC/Contreras contract, Alfonso was seriously burned when hot tar spilled on him. Alfonso was immediately taken to the hospital where it was reported that he had sustained the burns while working at home.

The evidence regarding VMS' knowledge of this incident was disputed, however, there was no dispute that Contreras did not have worker's compensation insurance and that ABC and VMS did not report this incident to their compensation carriers. Alfonso never asserted a claim for worker's compensation benefits, but instead filed suit against both ABC and VMS for negligence. VMS responded and claimed worker's compensation immunity. ABC settled its portion of the case with Alfonso.

Thereafter, Alfonso moved for an entry of partial summary judgment against VMS arguing that they were estopped from claiming worker's compensation immunity and from asserting comparative negligence because they failed to notify its worker's compensation carrier that Alfonso had been injured. The trial court agreed, however, the Third District reversed. In doing so, they held that VMS was not liable for injuries sustained by Alfonso where it had secured worker's compensation coverage for Plaintiff by virtue of the coverage secured by its sub-contractor. The Court also found that VMS had no obligation to notify its carrier of the Plaintiff's injury and could not be estopped from asserting the immunity.

Baker v. Airguide Manufacturing, LLC, 151 So. 3d 38 (Fla. 3d DCA 2014)

Baker began working for a company called Pacesetter; an employment agency that supplies employees to short-handed companies. Pacesetter placed Baker along with other Pacesetter employees with Airguide. While working at Airguide 2 years later, Baker suffered an injury. An Airguide supervisor helped her to wash the wound and then called Pacesetter to deal with the injury. Pacesetter sent a driver to pick her up and then brought her back to the Pacesetter facilities where she filed a report. She was subsequently taken to a doctor's office and then to a hospital. She then successfully filed a worker's compensation claim and, after receiving an unsatisfactory amount, she filed an action against Airguide. Airguide moved for Summary Judgment arguing that it was immune from liability because Baker was either a borrowed servant or was an employee of the help supply service company provided under Florida Statute §440.11(2).

The Motion for Summary Judgment relied heavily upon Baker's deposition testimony. In her testimony, she testified that she reported directly to Airguide in the mornings, was trained to use the machines by Airguide employees, was monitored and reprimanded by Airguide employees and was assigned weekly hours and tasks by Airguide management. Two days before the Summary Judgment hearing and 4 months after her deposition, she filed an Affidavit and an errata sheet that materially conflicted with the statements she made during her deposition. The trial court entered Summary Judgment ruling that Airguide was entitled to worker's compensation immunity. The Third District also pointed out that a party may not rely on an Affidavit that contradicts or repudiates prior deposition testimony to defeat a Motion for Summary Judgment. *See Ellison v. Anderson*, 74 So. 2d 680, 681 (Fla. 1954).

Lo Bello v. State Farm Florida Insurance Company, 152 So. 3d 595 (Fla. 2d DCA 2014)

In 2002, the Lo Bellos moved into their home. In late 2004, they noticed cracking in their home but believed it to be from normal settlement and did not associate it with sinkhole activity. In 2008, they consulted a public adjuster and then filed a claim under their sinkhole insurance. State Farm then took examinations under oath of the Lo Bellos and denied coverage for the claim based upon late reporting and the assertion that State Farm had been prejudiced by its inability to perform a prompt investigation. They also alleged that the Lo Bellos failed to take appropriate measures to save or protect the property from further peril.

The homeowners then filed a claim against State Farm and in defense of the claim, State Farm raised the failure to timely report the claim and that they had been prejudiced by the late notice. State Farm was granted Summary Judgment and the Second District reversed holding that there were material issues of fact concerning whether the insureds timely reported of their loss to State Farm.

The Second District stated that, in considering State Farm's defense of untimely notice, the Court's must follow a two-step analysis which requires determining whether notice was timely given, and, if untimely, whether the insurer was prejudiced by the untimely notice. In this case, they ruled that the question as to whether the insureds timely reported the claim to the insurer was an issue of fact for the jury to decide. If the jury determined that the notice was untimely, then the insureds can only recover if they overcome the presumption of prejudice.

Cammarata v. State Farm Florida Insurance Company, 152 So. 3d 606 (Fla. 4th DCA 2014)

The trial court entered summary judgment in favor of the insurance company in a bad faith action holding that the bad faith action was not ripe because State Farm's liability for breach of contract had not yet been determined. The Fourth District reversed finding that the bad faith action was ripe where State Farm's liability for coverage and the extent of the insured's damages had been determined by an appraisal award.

Solano v. State Farm Florida Insurance Company, 155 So. 3d 367 (Fla. 4th DCA 2014)

The trial court entered Summary Judgment in favor of State Farm finding that because the insureds had not appeared for an examination under oath as required by the policy provisions, they failed to comply with the conditions precedent to filing suit which required judgment in favor of State Farm and a forfeiture of benefits.

The insureds brought property damage claim following Hurricane Wilma. The policy required the insureds to comply with certain post-loss conditions including submitting to an examination under oath, submitting sworn proofs of loss and giving timely notice of damages, as well as exhibiting damages at State Farm's request. Although State Farm made payments in 2006, the insureds hired a public adjuster in 2009 who asked State Farm to re-open the claim. The public adjuster submitted a claim in excess of $200,000.

State Farm inspected the property with the adjuster and made an additional payment for some damage and notified the insureds that it would continue to investigate the other damage claims. State Farm inspected the property with the adjuster and made an additional payment for some damage and notified the insureds that it would continue to investigate the other damage claims.

Thereafter, the public adjuster submitted several additional sworn proofs of loss increasing the amount of damage claimed. After the third sworn proof of loss, State Farm asked the insureds to submit to an examination under oath. It also asked that the adjuster submit to an examination if the insureds intended to rely upon his knowledge and opinions. The insureds appeared for the examination under oath and filed a fourth proof of loss.

The husband gave his examination under oath and deferred almost entirely to the adjuster as to the type and extent of damages, as well as, the cost of the damage. He also deferred to his wife to answer a few questions. At the end of his interview, he refused to allow his wife to submit to an examination under oath that day because he felt that the examination might put her under too much mental stress. The public adjuster also refused to give a statement under oath, although he said he might do so in the future. The public adjuster took the position that State Farm could not compel him to provide a sworn statement.

Later, State Farm advised the insureds that they had deprived them of a meaningful examination under oath and advised them to present any additional documents or information regarding their claim. State Farm also asserted that the insureds had failed to provide a proper sworn proof of loss. They eventually explained to the insureds what documents were still needed and why it believed the proofs of loss were deficient.

The insureds retained counsel who then submitted a fifth proof of loss and demanded an appraisal. Their counsel offered to submit the wife to an examination under oath. State Farm accepted the fifth proof of loss together with documentation as complying with the policy, but asserted an appraisal was premature until it had investigated the claim. The parties then scheduled the wife's examination under oath and to examine her, as well as the public adjuster and to receive the documentation requested in its letters. Five days before the scheduled examination under oath, the insureds filed a Complaint against State Farm to compel an appraisal.

The wife then appeared for her examination under oath as scheduled and was prepared to testify but State Farm's counsel, citing the filing of the lawsuit and pending litigation, declined to proceed with the examination. State Farm then moved to dismiss the original Complaint and the Plaintiffs filed an Amended Complaint alleging that State Farm had breached the policy by denying coverage. The Amended Complaint did not request an appraisal.

State Farm then moved for Summary Judgment arguing that Plaintiffs failed to comply with their post-loss obligations before filing suit in violation of the policy's "no action" clause. The trial court granted Summary Judgment, however, the Fourth District reversed.

Although the Fourth District has held that a requirement to provide an examination under oath is a condition precedent to recovery and "an insured's refusal to comply with the demand for a statement is a willful material breach of an insurance contract which precludes the insurer from recovery under the policy"; nevertheless, they pointed out that the insureds in this case cooperated to some extent and therefore a fact question remained as to whether the condition was breached to the extent that the insureds should be denied any recovery under the policy.

Specifically, the husband appeared for his Unsworn Statement, gave answers to some of the questions posed and deferred to the adjuster for most of the other information. He arranged for the adjuster to attend an examination under oath, but the public adjuster on his own refused to provide the sworn statement. State Farm did not show that the insureds could have compelled the adjuster to provide a sworn statement and, as such, the Summary Judgment was reversed.

Use of Deposition

Borden Dairy Company v. Kuhajda, 152 So. 3d 763 (Fla. 1st DCA 2014)

During closing argument, the Plaintiff played a portion of the deposition of the Defendant driver. This videotaped deposition was admitted into evidence at trial without objection. During the driver's live testimony at trial, the Plaintiff impeached him with portions of his transcribed videotaped deposition. Before resting her case, Plaintiff's counsel stated that he wanted to use a portion of the videotaped deposition during closing argument. The Defendant raised an objection to allowing the use of the deposition and the trial court reserved ruling on same.

In closing argument, the Plaintiff played the video clip from the deposition without objection. Following a verdict for the Plaintiff, the trial court denied a Motion for New Trial and the First District affirmed. Florida Rule of Civil Procedure 1.330(a)(2) provides that a party's deposition can be used for any purpose and once the videotaped deposition had been admitted into evidence, it was fully available for the jury to consider.

Within Court's Discretion to Order Plaintiff's Deposition by Videoconference

Florida Highway Patrol v. Bejarano, 137 So. 3d 619 (Fla. 1st DCA 2014)

The Plaintiff filed a lawsuit after being struck by a Florida Highway Patrol vehicle while walking along a road in Okaloosa County. At the time of the accident, the Plaintiff was an active duty United States Marine stationed nearby. After filing suit in Okaloosa County, the Plaintiff was transferred to a base in California; more than 2,000 miles away.

The Florida Highway Patrol set the deposition of the Plaintiff in Okaloosa County, however, after receiving the notice, the Plaintiff moved for protective

order. The Plaintiff requested that he be allowed to appear for his deposition via video conferencing that he would arrange and pay for in order to limit work related hardships and the time and expense of traveling back to Okaloosa County.

The Highway Patrol opposed the motion, but the trial court ultimately granted the motion pursuant to its authority under Rule 1.280 to spare parties from undue discovery burdensomeness and expense and gave three reasons for its decision: the travel distance from California to Okaloosa County; the Plaintiff's active duty service in the Marines and his involuntary transfer to California; and, his willingness to pay the cost of the video conferencing and recording of the deposition.

The Court also reserved jurisdiction to determine whether the deposition's reporting and video were of sufficient quality, whether the Plaintiff ultimately would be required to appear in Florida before trial for an in-person deposition and whether either party could ultimately use the deposition for any purpose.

The Florida Highway Patrol filed a Petition for Certiorari which the First District denied finding that the granting of the protective order did not clearly cause material harm at this point in the proceedings and, further, that the order did not violate the essential requirements of the law. In fact, the law comported with the discretionary authority granted to trial courts to administer discovery.

2014
CASE LAW SUMMARY

Trial Issues

Appropriate to Use Videotaped Deposition of Defendant During Closing

Borden Dairy Company v. Kuhajda, 152 So. 3d 763 (Fla. 1st DCA 2014)

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Collateral Source Setoffs

Hurtado v. Desouza, 39 FLWD 2462 (Fla. 4th DCA 2014) **Not released for publication.**

Following a verdict for Plaintiff, the Defendant sought a collateral source set off for payments of unemployment compensation received by the Plaintiff. The trial court granted the set-off and the Fourth District reversed finding that the plain language of the collateral source statute does not allow for a set-off of unemployment compensation benefits.

Directed Verdict

Marcum v. Hayward, 136 So. 3d 695 (Fla. 2d DCA 2014)

Trial court should have granted Marcum's directed verdict where she successfully established the defense of loss of consciousness. Marcum suffered a seizure, blacked-out and rear-ended Hayward. Hayward did not put forth an expert to refute Marcum's expert testimony that the seizure was unforeseeable. To establish this defense, the defendant must prove: 1) the defendant suffered a loss of consciousness or capacity; 2) the loss of consciousness or capacity occurred before the defendant's purportedly negligent conduct; 3) the loss of consciousness was sudden; and 4) the loss of consciousness or capacity was neither foreseen nor foreseeable.

Error to Deny Continuance Where No Extensive Prejudice to Opposition

Scott v. Reflections of Sebastian, LLC, 133 So. 3d 1046 (Fla. 4th DCA 2014)

It was error to prevent Defendant Scott from presenting evidence or testifying at trial as sanction for failure to comply with discovery deadlines. Most of the discovery failures were attributable to Scott's prior counsel and the trial court did not find that Scott's conduct was willful or contumacious. Scott obtained new counsel before trial who unsuccessfully moved for a continuance and to vacate the sanctions. Denial of the continuance was also improper as there was no extensive prejudice to the opposition – Reflections only asserted it was ready to go to trial and did not wish to wait.

Jury Instructions – Subsequent Medical Negligence

In Re: Standard Jury Instructions in Civil Cases 135 So. 3d 281 (Fla. 2014)

The Supreme Court approved the addition of standard jury instruction 501.15(c). This amendment was prompted by *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977) which determined that the treating doctor's negligence in rendering medical care to the victim for the initial injuries is part of the consequence caused by the original negligence that required the medical treatment. The amended instruction is intended for use in cases involving additional injury caused by subsequent medical treatment following the original tort. Although the Supreme Court approved this instruction, it did so without ruling on the correctness of the instruction. Further, the approval of the instruction did not foreclose requesting

additional or alternative instructions or even contesting the legal correctness of this instruction at trial.

Motions in Limine Alone Do Not Preserve Issue for Appeal

Boyles v. A & G Concrete Pools, Inc., 149 So. 3d 39 (Fla. 4th DCA 2014)

The Plaintiff was allegedly injured as a result of this 2008 motor vehicle accident. Notably, the Plaintiff had been involved in an accident in 2001 and claimed that he suffered from four herniated discs as a result of that earlier accident. When the patient's pain did not improve from the 2008 accident, he was referred to Dr. Katzman. Notably, the Plaintiff never told Dr. Katzman that he had any prior injuries to his neck.

When Dr. Katzman later discovered that the patient had experienced back pain from the 2001 accident, the patient maintained that the problems had resolved at least two years before the 2008 accident. When conservative treatment did not improve the patient's symptoms, Dr. Katzman performed a lumbar procedure and then a cervical procedure. Dr. Katzman related both procedures to the injury sustained in the 2008 accident. The lumbar procedure was successful; however, the cervical procedure was not successful.

The patient then saw Dr. Dare; a neurosurgeon. During the initial evaluation with Dr. Dare, the patient did not advise him of the 2001 car accident nor did he advise him of the treatment for back pain he received over many years. Dr. Dare later received medical records from the Plaintiff's attorney revealing a prior medical history; he questioned the patient who reported that he was back to normal at the time of the 2008 accident. Dr. Dare performed additional surgery on the patient's back and his condition ultimately improved.

An IME was subsequently performed and the IME physician stated that he would not have recommended surgery because the patient did not show neurological deficits. Two years before trial and before the IME, the Plaintiff filed an extensive Motion in Limine which, amongst other things, sought to exclude testimony regarding unnecessary or unreasonable surgeries. The Fourth District admonished against the use of these kinds of motions and criticized the fact that the motion was generic and filed before most evidence was even in the record, as well as, the fact that it was argued so long before the trial.

The Judge who entered the order on the Motions in Limine did not try the case. A successor Judge looked at the Motion in Limine and it appears as though he suggested that timely objections would be necessary. When the IME physician was questioned regarding the unnecessary surgery, the Plaintiff failed to object. As such, the Fourth District found that the issue was not preserved.

Further, they noted that even if the lawyer had preserved the objection, the testimony of the IME doctor still could be admitted because the testimony did not involve an expert trying to attribute subsequent malpractice or trying to avoid subsequent malpractice, but rather, the testimony had to do with the causal link between the surgeries and the accident in question. Further, in cases where the IME testimony was ruled to be inadmissible, the claim was that the inappropriate or unnecessary surgery worsened the Plaintiff's condition. Here, however, the Plaintiff's own witnesses testified that that surgery made the condition better.

Motion to Interview Juror

Naugle v. Philip Morris USA, Inc., 133 So. 3d 1235 (Fla. 4th DCA 2014)

Following a jury verdict for the Plaintiff, the jury foreman left a voicemail message at the Judge's office that he received a text from a juror that something was done wrong by them during the trial process. The trial court issued an order memorializing the message and prohibiting juror contact by the parties and counsel. Philip Morris filed a motion to interview jurors and to preserve the text message. The trial court then entered an order for the foreman to bring his cell phone so the judge could review the text *in camera*. The Judge could ask questions of the foreman. The parties could submit proposed questions but could not question the foreman directly.

On appeal, the Fourth District held the order allowing the limited *in camera* inquiry did not invade the sanctity of jury deliberations or violate Florida Rule of Civil Procedure 1.431(h), which provides the requirements for juror interviews. Additionally, the court did not violate Florida Statute §90.607(2)(b) which does not allow juror questions except of matters involving overt prejudicial acts. The Fourth District noted that the voicemail did not establish any actual misconduct that could amount to an overt prejudicial act, but the trial court's limited review would only establish if there were grounds for a full blown interview. Furthermore, no sworn testimony from counsel or a party is necessary to accompany a motion to interview where the juror contacts the court directly.

New Trial – Evidence of Settlement

Bern v. Camejo, 39 FLWD 94 (Fla. 3d DCA 2014)

This was a motor vehicle accident case involving a three car collision. Bern, who was injured, sued: Acevedo as the driver of one vehicle; Camejo as the owner of the vehicle driven by Acevedo; Perez, the driver of the third vehicle; and Martinez, the owner of the vehicle driven by Perez. Prior to trial, Bern settled her claims against Perez and Martinez and dismissed them from the suit and proceeded to trial against Acevedo and Camejo. Before trial, Bern filed a Motion in Limine seeking to exclude any evidence or argument that Perez had previously been sued or named as a Defendant in the action or any evidence that the claims against Perez had been settled or dismissed.

In response, the Defendants argued that they should be allowed to present evidence that Perez was a prior Defendant in the case because her status as a Defendant at the time she gave her deposition was relevant in weighing her credibility. Although the Defendants intended to argue at trial that it was Perez's negligence which caused the accident, the Defendants also sought to establish that it was the Plaintiff who first alleged that Perez caused the accident and sued Perez for such negligence.

The trial court granted the Motion in Limine in part and denied it in part agreeing with the Defendants that Perez's status as a former Defendant in the case was relevant to establishing her bias during her deposition testimony and granted the Motion in Limine insofar as it prevented the parties from mentioning or introducing evidence that Perez had settled with Bern. Throughout the trial, there were repeated references made to Perez's status. The Third District reversed the trial court's ruling noting that Florida Statute §768.041(3) "plainly and unambiguously prohibits disclosure to the jury of any evidence of settlement or that a former Defendant was dismissed from the suit."

New Trial – Exclusion of Evidence as Surprise

Kellner v. David, 140 So. 3d 1042 (Fla. 5th DCA 2014)

In a collision between a motorcycle and a motor vehicle, the Defendant was not permitted to testify regarding accident scene measurements he took several

days before trial. In so doing, the trial court found that the measurements were taken after the discovery cut off. Further, the trial court prevented the Defendant from testifying regarding his estimate as to the distance between his vehicle and the motorcycle at the time of the accident.

The Fifth District affirmed noting that rulings on evidentiary matters are generally within the sound discretion of the trial court. They also noted that such testimony should be excluded as surprise under the *Binger* decision. Accordingly, the denial of the new trial was affirmed by the appellate court.

The dissent noted that the Defendant did not have an opportunity to testify to his measurements before the Court called him up to sidebar. There was no objection from the Plaintiff at this point. Further, the dissent noted that the Plaintiff did not ask the Defendant questions regarding his estimate of the distance between the motorcycle and the car at his deposition and, therefore, could not claim surprise. The dissent also noted that an expert is not required in order to measure a distance between vehicles adding that witnesses may generally testify as to both distance and speed.

New Trial – Failure to Object to Testimony Waives Right to Object Later on Same

Hguyen v. Wrigley, 39 FLWD 1398 (Fla. 5th DCA 2014) **Not released for publication.**

The Plaintiff sued the salon for injuries she sustained while receiving a paraffin wax manicure. At trial, the Plaintiff called a witness who testified that, shortly after placing her hands inside the wax treatment mittens, the Plaintiff started complaining that her fingers were burning. After that, the Plaintiff's fingernails turned black and started ripping back and tearing off like blisters. The Plaintiff testified that her nails remained in this condition for nine months.

The Plaintiff's counsel introduced three photographs of the Plaintiff's fingernails which allegedly depicted the Plaintiff's injuries after two hours, two weeks, and four weeks. On cross-examination, the defense attorney questioned the witness about the photographs and the witness testified that she took all of the photographs shown, as well as, many more.

During closing, defense counsel argued that the witness admitted she took the photographs of the nails and then asked the jury rhetorically why the Plaintiff did not present the other photos. Plaintiff's counsel objected and this objection was sustained. During closing, defense counsel argued that the Plaintiff filed a lawsuit and this was a court room and not a lottery and once again, counsel immediately objected and the objection was sustained with the jury being instructed to disregard the comment. No Motion for Mistrial was made.

The jury returned a verdict attributing 20% of the fault to the Defendant and 80% to the Plaintiff. When the trial court granted the new trial, the Fifth District reversed. It found that the Plaintiff's failure to object when the witness testified regarding the other photos waived the right to complain later about the comment on same. The court also found that the isolated reference to the lottery was not enough to damage the public's interest in the system of justice requiring a new trial.

New Trial – Harmless Error Test

Special v. West Boca Medical Center, 39 FLWS 676 (Fla. 2014)

In this case, the Florida Supreme Court reversed a defense verdict ruling that the test for harmless error in a civil appeal requires the beneficiary of the error to prove that the error complained of did not contribute to the verdict. That is, the beneficiary of the error must prove that there is no reasonable possibility that the error complained of contributed to the verdict. In this case, the Supreme Court held that it was error for the trial court to preclude the Plaintiff from cross-examining the defense expert concerning whether this hospital was over diagnosing amniotic fluid embolism. Further, it was error to exclude evidence related to alleged witness tampering by defense counsel.

New Trial – Order Granting New Trial Reviewed for Abuse of Discretion

Meadowbrook Meat Company v. Catinella, 39 FLWD 2515 (Fla. 2d DCA 2014) **Not released for publication in reporter. Opinion withdrawn and superseded by 40 FLWD 402 (Fla. 2d DCA 2015)**

Following a verdict for the Defendant, the trial court granted a new trial. In doing so, it issued a detailed order setting forth that the Defendant had destroyed

evidence, had violated Court Orders, had willful discovery violations and that two jurors had engaged in misconduct by failing to disclose their litigation history. The Defendant did not argue that the trial court's observations were unsupported by the record, but rather, argued that the trial court abused its discretion in concluding that the circumstances detailed in its order warranted a new trial. Finding no abuse of discretion, the Second District affirmed the granting of the new trial.

New Trial – Juror Non-Disclosure

Weissman v. Radiology Associates of Ocala, 152 So. 3d 754 (Fla. 5th DCA 2014)

Following a verdict for the Plaintiff, the Defendant filed a Motion to Conduct Juror Interviews alleging material non-disclosure by several jurors. The trial court conducted juror interviews and then granted the Motion for New Trial finding that three of the jurors had failed to disclose material information. The Plaintiff appealed contending that the trial court abused its discretion in ordering a new trial arguing that none of the alleged non-disclosures were sufficient to grant the new trial.

During voir dire, the prospective jurors were asked whether they had "ever been to Radiology Associates of Orlando (RAO)." They were also asked whether they had any negative feelings about doctors, hospitals or healthcare providers. None of the prospective jurors responded affirmatively. After conducting a post-trial search of its internal billing records, RAO claimed that one of the jurors had received services from them at an area hospital and that her account had gone into collection.

At the hearing on the motion, RAO's counsel provided documents to the Court over the Plaintiff's objection showing that the juror had been billed for services performed and that the account had been sent to collections. During her interview, however, the juror never testified that she had been to RAO, received services from RAO, received any bills from RAO, or that any bills from her had gone to collection. Accordingly, the Fifth District concluded that, because RAO failed to properly authenticate its documents and presented no witnesses at the hearing to identify the documents, that these documents were improperly admitted into evidence.

As for the second juror, RAO asserted that he failed to disclose that he had filed a Chapter 13 bankruptcy. During voir dire, the prospective jurors were not specifically asked about bankruptcy filings. Rather, counsel for the Plaintiff asked if the jurors had ever been involved in any kind of litigation, either as a Plaintiff or Defendant. None of the jurors responded affirmatively. The third juror also failed to disclose a Chapter 7 bankruptcy. The Fifth District found that the question asked about prior litigation was too imprecise to question these responses.

New Trial – Peremptory Challenge Must Be Raised Before Jury Sworn

McNeil v. State of Florida, 39 FLWD 1016, (Fla. 5th DCA 2014) **Not yet released for publication.**

During trial, the State moved to exercise a peremptory challenge against a juror who informed the Court Deputy during a recess that he recognized the Defendant's son who had been called to testify for the defense and that the juror had treated the Defendant's son for a football-related injuries in his capacity as a Physical Therapist for a local high school. The trial court allowed the exercise of the peremptory challenge and the Fifth District reversed noting that there were no cases which have permitted a trial court to use a peremptory challenge mid-trial.

Objection to Juror must be Renewed Prior to Swearing in Jury

Johnson v. State, 141 So. 3d 698 (Fla. 1st DCA 2014)

During voir dire in this criminal case, the prosecutor asked a catch-all question seeking to learn if there was anything that he had not asked that the prospective jurors felt they should tell him. A prospective juror then said something which suggested he believed the Defendant had a prior criminal record.

Defense counsel approached the bench and requested the trial court strike the entire panel arguing that the comment had put the suggestion of the prior criminal record in the panel's mind and had tainted all of them. After the jurors were selected, however, defense counsel failed to object again before the jury was sworn. The failure to do so waived the objection and the Court affirmed the Defendant's conviction based upon the lack of preservation of error.

Party Can Challenge Juror Any Time Before Jury is Sworn

State v. Page-Martin, 135 So. 3d 491 (Fla. 2d DCA 2014)

Before a jury had been sworn in, the prosecutor requested to use his remaining peremptory challenges as back strikes even though the original jury venire had been dismissed. The trial court denied this request and the State filed a Petition for Certiorari. The Second District granted the Petition holding that it was a departure from the essential requirements of the law to deny the State's request noting that "parties may challenge a prospective juror at any time before the jury is sworn…a trial Judge has no authority to infringe upon a party's right to challenge any juror, either peremptorily or for cause, prior to the time the jury is sworn."

Permanent Injury Does Not Require Award for Future Non-Economic Damages

Buitrago v. Feaster, 40 FLWD 81 (Fla. 2d DCA 2014)

The jury awarded the Plaintiff damages for past medical expenses, lost wages and non-economic damages and $450,000 in future medical damages but no future non-economic damages. The Plaintiff moved for a new trial claiming that the evidence and verdict established that she was entitled to future non-economic damages. The trial court granted the Motion for New Trial and the Second District reversed noting that a verdict is not inadequate as a matter of law when the jury finds a Plaintiff has suffered a permanent injury but does not award future intangible damages.

They further noted that the correct standard to apply in considering a Motion for New Trial based on an allegedly inadequate award of non-economic damages is whether the verdict was against the manifest weight of the evidence. Because the Plaintiff failed to argue this standard and because the record below makes it clear that the trial court did not consider the weight of the evidence in granting a new trial, the new trial order was reversed.

Following the trial, the jury returned a verdict substantially in excess of the proposal for settlement. The trial court granted the attorney's fees, however, the First District reversed saying that the proposal deprived the driver of the ability to evaluate and independently act to resolve the case against her.

Waiver of Right to New Trial Where Agreed to Verdict Form

Millsaps v. Kaltenbach, 152 So. 3d 803 (Fla. 4th DCA 2014)

Millsaps sued Kaltenbach for causing an accident. Kaltenbach filed an Answer in which he affirmatively alleged the negligence of the driver of an unidentified vehicle. Millsaps then filed an Amended Complaint that added an additional claim for uninsured/underinsured motorist coverage against State Farm under the belief that the Defendant was underinsured for the damages claimed, but not under the theory that State Farm would stand in the shoes of the driver of the unidentified third vehicle. At trial, and over objection, the Plaintiff was permitted to amend her pleadings to conform to the evidence regarding the third vehicle's negligence that the Defendant presented during the trial and to add that vehicle to the uninsured motorist claim against State Farm.

During the charge conference, however, counsel for Plaintiff abandoned the uninsured motorist claim against State Farm for the actions of the unidentified third vehicle driver and advised the Court that they did not want to blame that driver. As a result, the Court directed a verdict in favor of State Farm on the uninsured motorist claim for the actions of the unidentified third vehicle and the Plaintiff did not object.

Thereafter, proposed jury instructions and the verdict form were drafted to include the question of the unidentified driver's negligence, but only as an Affirmative Defense. Counsel for the Plaintiff advised that he had no objection to either the jury verdict form or the instructions. Thereafter, the jury found that there was no negligence on the part of Kaltenbach. A Motion for New Trial was denied and the Fourth District affirmed finding that the actions of the Plaintiff essentially dismissed the claim against the unidentified third party.