2015

CASE LAW SUMMARY

Procedural and Legal Issues

Arbitration Clause Not Applicable Following Sexual Assault At Work

Club Mediterranee S.A. v. Fitzpatrick, 162 So. 3d 251 (Fla. 3d DCA 2015)

Fitzpatrick worked for Club Mediterranee. She was asleep in her employer-provided dormitory room on one of its properties when she was attacked and sexually assaulted by an unknown assailant. She then filed suit against her employer and its affiliated companies. Her employment agreement included a provision which required arbitration of any claim or controversy arising out of her employment.

Upon being served with the suit, Club Mediterranee filed a Motion to Compel Arbitration which the trial court denied. The Third District affirmed finding that a claim seeking compensation for harm resulting from a sexual attack in an employer-provided dormitory room during Plaintiff's non-working hours and away from Plaintiff's place of work did not constitute a claim or controversy arising out of her employment.

Attorney Client Privilege

Las Olas River House Condominium Association, Inc. v. LORH, LLC, 40 FLWD 2714 (Fla. 4th DCA 12/9/15)

The Fourth District granted certiorari and quashed the trial court's order which compelled a condominium association to produce documents including certain communications with its counsel over their assertion of attorney/client privilege without conducting an *in-camera* inspection. The Fourth District noted that the condominium association did not waive its privilege by copying employees of the association's property management company on the correspondence because the individuals were agents of the association whose contractual duties required them to communicate with the association's counsel on behalf of the association.

The case was remanded to the trial court with instructions to conduct an *in-camera* inspection using a five-part test for determining whether the communications were attorney/client privilege: (1) the communication would not have been made but for the contemplation of legal services; (2) the employee making the communication did so at the direction of his or her corporate superior; (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services; (4) the content of the communication relates to the legal services being rendered and the subject matter of the communication was within the scope of the employee's duties; and (5) the communication was not disseminated beyond those persons who, because of the corporate structure, needed to know of its contents.

Brannon v. Palcu, 177 So. 3d 693 (Fla. 4th DCA 2015)

Palcu sought information to demonstrate that Dr. Brannon perpetuated a fraud or obstructed justice when he testified in his criminal case. Palcu then sought discovery from Brannon including a specific e-mail string between Brannon and his attorneys. The trial court conducted an *in-camera* review of the e-mail string and ordered that it be produced. Brannon filed a Petition for Certiorari arguing that the trial court was required to conduct an evidentiary hearing before ordering the production. The Fourth District granted the Petition for Certiorari and ordered the trial court to conduct an evidentiary hearing to allow the petitioners to argue why the crime-fraud exception should not apply.

Attorney's Fees

Vista St. Lucie Association, Inc. v. Dellatore, 165 So. 3d 731 (Fla. 4th DCA 2015)

The Condominium Association filed a Complaint against Co-Trustees of a trust which owned a unit in its condominium alleging breach of contract and unjust enrichment. The Trustees filed a counterclaim alleging tortious interference with a contract and they served the Association with discovery requests on April 4. On May 10, the Association moved for a 30-day extension of time to respond, admitting that it was already late in doing so. The Trustees moved to compel discovery because the Association had not responded.

Without conducting a hearing, the trial court entered an Order on July 11 compelling the Association to answer the discovery within 30 days of the Order.

On August 15, the Trustees moved to dismiss the Complaint with prejudice due to the Association's failure to comply with the Order compelling discovery. They also requested sanctions against the Association and requested attorney's fees and costs. The Trustees attached an Affidavit of their attorney in support of the motion attesting to the facts, the expenditure of time, the hourly billing rate, and total amount of fees requested.

Without conducting a hearing, the trial court entered an Order of Dismissal with Prejudice and an Order of Attorney's Fees noting that the Association failed to comply with the Orders to produce discovery and also entered an award for attorney's fees. The Association moved for re-hearing arguing that it had faxed the Answers to Interrogatories and Request of Admissions to its counsel on August 5 and the Association's counsel represented this his office inadvertently failed to mail the discovery to the Trustee's counsel while he was on vacation. The Association's counsel took blame for his failure to respond upon his return from vacation. The Association then argued that the Order should be vacated because the trial court failed to conduct the required analysis and ordering sanctions as required by *Kozel v. Ostendorf*.

Almost two years after the Association moved for re-hearing and after retaining new counsel, it moved for a Case Management Conference and requested the conference to allow the parties to coordinate a hearing on the pending motion, attend a mediation conference and set discovery deadlines to resolve the case. The trial court denied the Association's motion stating that "the case was dismissed with prejudice over 18 months ago." The trial court then went on to deny the previously filed Motion for Rehearing and it was from this Order that the Association appealed.

The Fourth District reversed finding that the trial court abused its discretion in dismissing the Complaint with prejudice because it failed to make the requisite findings required by *Kozel v. Ostendorf***.** Further, they reversed the award for attorney's fees because the trial court did not make express findings on the number of hours reasonably expended and the reasonable hourly rate and did not require expert testimony in support of the award.

State Farm Florida Insurance Company v. Alvarez, 175 So. 3d 352 (Fla. 3d DCA 2015)

In 2005, State Farm paid the homeowners $13,700 for damage caused by Hurricane Wilma. In 2009, the insureds retained a public adjuster who prepared a report reflecting a claim for an additional $80,000. Based upon the public adjuster's report, the insureds requested appraisal pursuant to the insurance policy. This was rejected by State Farm. Suit was then filed. After three years of litigation, the insured claimed $80,000 in damage and State Farm offered $175. At mediation, the case settled for $10,000. Following this, the trial court then awarded attorney's fees. Specifically, they awarded a blended rate of $400 per hour; found that 200 of the 225 hours billed was reasonable; and awarded a 1.5 multiplier because counsel with "specialized knowledge" of first-party property insurance cases would not represent the insureds without the possibility of a multiplier.

On appeal, the Third District found that the trial court did not abuse its discretion in awarding a blended rate of $400 per hour noting that the hourly rate awarded was on the lower end of the hourly rate range suggested by State Farm's own expert witness. The Third District did, however, reverse on the issue of the reasonableness of the hours. They noted that 11 different attorneys billed on the file and that "this alone should have alerted the trial court to a problem" adding that "a court should be extremely wary of paying fees to so many lawyers for such a relatively small case with relatively straightforward legal issues and no precedential value." They also noted that the billing records raised concerns because it included items such as 10 hours of Senior Partner time to draft a 5-page complaint that appeared to be a form; 7 hours spent by a Senior Partner to prepare a 3-page form Motion to Compel Appraisal that was never set for hearing; an additional 11-hours of Senior Partner and Associate time to prepare a Second Motion to Compel Appraisal that was identical to the first one and which was also never set for hearing; and various conferences between many lawyers without any indication of how those conferences advanced the case. Lastly, the Third District reversed the award of the multiplier noting that the application of a multiplier "is the exception, not the rule."

Federated National Insurance Company v. Joyce, 179 So. 3d 492 (Fla. 5th DCA 2015)

Federated appealed an award of attorney's fees in favor of the Joyces following settlement of an insurance dispute. The action arose from a denial of coverage based upon an alleged material misrepresentation in the Joyces' homeowner's insurance application. In denying the claim, Federated argued that the insureds had failed to disclose two prior insurance claims at the time of their application however, early in discovery it came to light that they had actually disclosed the prior claims.

Federated acknowledged the error and they entered into a Settlement Agreement, exclusive of attorney's fees. The trial court determined a reasonable attorney's fee and then applied a "multiplier" of 2.0. The Fifth District reversed finding that there was no basis for a multiplier because this was not a complicated case noting that the only issue was whether the insureds had falsified their insurance application or whether the insurance company had made an error. There were no esoteric legal issues or complicated factual disputes to resolve and, "as one would anticipate given today's legal market, there was no evidence the Joyces had any difficulty obtaining counsel to handle this matter. Indeed, it took only one phone call for the Joyces to secure counsel."

Belated Appeals Not Available In Civil Actions

Harris v. Anne Bates Leach Eye Institute, 174 So. 3d 570 (Fla. 3d DCA 2015)

Plaintiff sought belated review in the appellate court of an Order of Dismissal based upon the statute of repose. The Third District denied the petition noting that belated appeals are available only in criminal cases and that Rule 9.141(c) of the Rules of Appellate Procedure do not apply to civil litigation. Further, the Third District noted that if the petition was to be treated as though he were seeking mandamus relief, this was also denied as well because he failed to bring his motion to the trial court's attention.

Certiorari

Armour v. Hass, 40 FLWD 807 (Fla. 4th DCA 4/8/15)

Armour and his law firm were sued for legal malpractice. They filed a Motion to Dismiss, Abate or Stay the Malpractice Action which the trial court denied. It was undisputed that the underlying litigation upon which the malpractice action was based was still pending. Although the trial court stayed the trial and any discovery as to damages, it otherwise allowed the action to proceed, including discovery as to liability. The Fourth District granted certiorari and quashed the lower court's ruling noting that until there is a judgment against the Plaintiffs in the underlying action, a malpractice claim is hypothetical and damages are speculative. Thus, the trial court erred in allowing any discovery to go forward and the case should have been stayed or abated.

Las Olas River House Condominium Association, Inc. v. LORH, LLC, 40 FLWD 2714 (Fla. 4th DCA 12/9/15)

The Fourth District granted certiorari and quashed the trial court's order which compelled a condominium association to produce documents including certain communications with its counsel over their assertion of attorney/client privilege without conducting an *in-camera* inspection. The Fourth District noted that the condominium association did not waive its privilege by copying employees of the association's property management company on the correspondence because the individuals were agents of the association whose contractual duties required them to communicate with the association's counsel on behalf of the association.

The case was remanded to the trial court with instructions to conduct an *in-camera* inspection using a five-part test for determining whether the communications were attorney/client privilege: (1) the communication would not have been made but for the contemplation of legal services; (2) the employee making the communication did so at the direction of his or her corporate superior; (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services; (4) the content of the communication relates to the legal services being rendered and the subject matter of the communication was within the scope of the employee's duties; and (5) the communication was not disseminated beyond those persons who, because of the corporate structure, needed to know of its contents.

United Automobile Insurance Company v. Davis, 154 So. 3d 489 (Fla. 3d DCA 2015)

Plaintiffs are not entitled to discovery of Defendant's financial information until the trial court determines whether they have properly stated a claim for punitive damages. In this case, no determination had been made and, in fact, no claim for punitive damages had even been filed. Because the Defendant's financial information was not relevant to any disputed issues raised by any other claim, the Third District granted certiorari and quashed the Circuit Court's Order permitting this discovery.

Millard Mall Services, Inc. v. Bolda, 155 So. 3d 1272 (Fla. 4th DCA 2015)

Plaintiff filed an action for negligence against the owner/operator of the mall. In prosecuting her claim, she sent a subpoena duces tecum to the corporate representative of one of the Defendants requesting various documents including incident reports concerning similar acts/occurrences which had occurred at the mall in the three years prior to the fall in question; documents concerning maintenance or cleaning of the subject premises during the month of the fall and documentation concerning maintenance or cleaning of the premises by an out side person/corporation or entity during the year of the fall. The Defendants objected to the production of the documents.

At the hearing, Defendants filed Affidavits stating that the documents included their quarterly safety committee reports, were not discoverable because they included incident reports that contained photographs, discussions surrounding the incidents and mental impressions regarding the incidents that occurred during the relevant time period. After reviewing the documents *in camera*, the trial court ordered production of the quarterly safety committee reports for the three year time period, but sustained a privilege objection concerning the incident report generated as a result of this fall.

Defendants then filed for certiorari review of the order asserting that the committee reports were not discoverable pursuant to the work product privilege. The Fourth District upheld this objection and quashed the trial court's order. In doing so, the Fourth District noted that the Plaintiff has been able to use discovery to obtain relevant information about the accident that she was involved in, as well as, similar prior incidents on the property and that the Plaintiff had the ability to obtain substantially equivalent information through discovery directed to the Defendants. The efforts enabled her to obtain a list of incidents on the premises for three years pre-dating the accident including the dates, times, locations and a

detailed description of those incidents. Because the Plaintiff has been unable to demonstrate that she was unable to obtain the substantial equivalent of the material by other means, the Defendants objections were sustained.

Judge Warner dissented finding that the documents should not be considered work product because these reports were used to promote safety and to determine whether proper maintenance was being done at the mall and not made in anticipation of litigation. Moreover, she believed that the enactment of the transitory foreign substances statute (Florida Statute §768.055) should make these reports discoverable.

In doing so, she pointed out that the respondent had requested that the mall preserve the video of the incident which could have shown how long the dangerous condition had existed, however, the video was not available. Thus, the Plaintiff must show that "the condition occurred with regularity and was therefore foreseeable." Judge Warner concluded that the quarterly reports could shed light on this issue and therefore should be produced.

United Automobile Insurance Company v. Riverside Medical Associates, Inc., 159 So. 3d 285 (Fla. 4th DCA 2015)

United Automobile sought certiorari review after the trial court denied their Motion to Dismiss the Plaintiff's premature Bad Faith Action and overruling their objections to the Plaintiff's premature Bad Faith Discovery Requests. The Fourth District granted the petition as to the discovery objections noting that until the obligation to provide coverage and damages has been determined, a party is not entitled to discovery related to the claims file or to the insurer's business policies or practices regarding the handling of the claims. They denied certiorari as to the denial of the Motion to Dismiss, however, they found that it was without prejudice to United Automobile filing a Motion to Abate the Bad Faith Action.

Bianchi & Cecchi Services, Inc. v. Navalimpianti USA, Inc., 159 So. 3d 980 (Fla. 3d DCA 2015)

A non-party was served with a subpoena and it objected to production of financial documents. The trial court entered an order requiring the non-party to produce the requested documents and the non-party then sought certiorari relief arguing that the trial court departed from the essential requirements of law by

entering its order without conducting an evidentiary hearing and *in-camera* review of the financial records.

The Third District rejected this position and noted that when a non-party objects to the production of allegedly confidential records, the trial court is required to weigh the requesting party's need for those records against the privacy interests of the objecting non-party. It added that, while conducting an evidentiary hearing or an *in-camera* review is generally the appropriate mechanism for assisting the trial court in balancing these competing interests, they declined to create a rule which would require the trial court to do so.

Nucci v. Target Corporation, 162 So. 3d 146 (Fla. 4th DCA 2015)

Plaintiff slipped at a Target store and claimed physical injury. Before taking the Plaintiff's deposition, Target's lawyer viewed the Plaintiff's Facebook profile and saw that it contained 1285 photographs. At her deposition, Plaintiff objected to disclosing her Facebook photographs. Target's lawyer examined the Plaintiff's Facebook profile after the deposition and saw that it now only listed 1249 photographs. As a result, Target moved to compel inspection of the Plaintiff's Facebook profile and requested that she not destroy further information posted on her social media websites. Target argued that it was entitled to view the profile because her lawsuit put her physical and mental condition at issue.

In response to the motion, the Plaintiff explained that since its creation, her Facebook page had been on a privacy setting that prevented the general public from having access to her account. She claimed a reasonable expectation of privacy regarding her Facebook information. The trial court conducted hearings on the matter during which time Target showed the Court photographs from a surveillance video in which the Plaintiff could be seen walking with two purses on her shoulders and also carrying two jugs of water. The trial court ultimately granted Target's Motion to Compel Production.

The Plaintiff filed a Petition for Certiorari which the Fourth District denied. The Fourth District refused to grant certiorari noting that the trial court did not depart from the essential requirements of the law by compelling the Plaintiff to produce photographs from her social network account for a period commencing 2 years prior to the accident at issue through the present finding that the order was appropriately narrow in scope and that the photographs were reasonably calculated

to lead to the discovery of admissible evidence relating to the Plaintiff's claim for intangible damages. They further held that any expectation of information shared through social networking websites is private is unreasonable and that the Stored Communications Act which prevents "providers" of communication services from divulging private communications to certain entities and/or individuals does not apply to the individuals who use the communication service provided.

Florida Power & Light Company v. Hicks, 162 So. 3d 1074 (Fla. 4th DCA 2015)

The Plaintiff sued FPL and filed a Request for Production. FPL responded with objections based upon the attorney/client privilege and filed a privilege log. After the Plaintiff filed a Motion to Compel, the Circuit Court required an *in camera* inspection of the documents for which FPL claimed privilege. Following inspection, the trial court ordered production finding that relevance required breaking of the privilege and that the documents contained information that could not reasonably be obtained from another source.

The Fourth District granted certiorari and quashed the order noting that, unlike the work product doctrine, the attorney/client privilege is not defeated by an opponent's showing of relevance and necessity adding that "an order compelling production of attorney/client communications based on relevance and need constitutes a departure from the essential requirements of law."

Grabel v. Sterrett, 163 So. 3d 704 (Fla. 4th DCA 2015)

Plaintiff filed an uninsured motorist claim and, thereafter, sought to depose the doctor who performed the Compulsory Medical Examination for the insurance company. The subpoena requested the doctor to bring various items to his deposition. The doctor objected to certain items and State Farm also moved for protective order asserting the same objections. The Court overruled the objections to three specific requests which included: (1) copies of all billing invoices submitted by the doctor to defense counsel, defense counsel's firm and the Defendant's insurer (State Farm) for a total of 6 years; (2) a document and/or statement that includes the total amount of money paid by or on behalf of the Defendants and/or their attorneys and/or the defense law firm including any predecessor and/or successor law firm and any of the attorneys presently or formerly employed at the law firm and the Defendants' insurer to the doctor for expert work over the 6 years; and, (3) all documents evidencing the amount or

percentage of work performed by the doctor on behalf of any Defendant and/or defense law firm and/or insurance carrier for 6 years including time records, invoices, 1099's and other income reporting documents.

The trial court overruled the objections but limited the request to 3 years. The trial court did not address the doctor and the insurer's objection that the discovery exceeded that allowed by Florida Rule of Civil Procedure 1.280(b)(5)(A)(iii) and did not find "unusual or compelling circumstances" but merely compelled the discovery. The Fourth District granted certiorari finding that the trial court departed from the essential requirements of the law by allowing discovery of financial information that exceeded the scope of discovery permitted under the Florida Rule of Civil Procedure without finding unusual or compelling circumstances.

Worley v. Central Florida Young Men's Christian, 163 So. 3d 1240 (Fla. 5th DCA 2015)

In this slip and fall case, the Defendants sought information on how the patient was referred to a variety of healthcare providers. The Defendant first attempted to obtain the information from the Plaintiff and the treating doctors. In this case, the treating doctors were unsure as to how the patient was referred and in deposition, the Plaintiff confirmed that she was not referred by the Emergency Department that treated her, by another doctor or by a friend or relative. Thereafter, the Defendants sought information regarding the relationship between the Plaintiff's counsel and these physicians.

The Fifth District denied certiorari and held that the Court Order which required Plaintiff's counsel to produce the names of any and all cases where clients were referred directly or indirectly by any attorney employed by the law firm to the treating physicians did not depart from the essential requirements of the law particularly where the Defendant had sufficiently demonstrated a good faith basis for suspecting that a referral relationship existed between the treating physicians and the Plaintiff's attorney. In so doing, they noted that the existence of a referral relationship between the Plaintiff's attorneys and her treating physicians was relevant and not privileged and was essential to the truth seeking function of the Court system.

Sedgwick Claims Management Services, Inc. v. Feller, 163 So. 3d 1252 (Fla. 5th DCA 2015)

The Fifth District granted certiorari and ruled that the trial court erred by finding the work product privilege to be inapplicable on grounds that the current case between these parties involved issues different than those presented in the prior litigation for which the documents were prepared. In doing so, they noted that it is "well established that 'work product retains its qualified immunity after the original litigation terminates, regardless of whether or not the subsequent litigation is related.'"

The District Court also held that the trial court erred by finding the attorney/client privilege inapplicable without ever reviewing the documents in question. In doing so, they ruled that the trial court erred by finding that the attorney/client privilege was waived by counsel's statement at a hearing that he did not anticipate objecting to the discovery requests because the client is the holder of the privilege and the client timely objected to the request. Lastly, the District Court found that the trial court erred by finding that the privilege was waived by counsel's filing of a privilege log which the trial court viewed as insufficient due to its lack of detail. The log was not produced in response to a trial court order and could have been amended to cure any defects had counsel been given that opportunity.

Muller v. Wal-Mart Stores, Inc., 164 So. 3d 748 (Fla. 2d DCA 2015)

Plaintiff was a veteran who had sustained injuries while in the military. After he got out of the military, he was struck by a truck belonging to Wal-Mart. The trial court granted a Motion to Compel Production of the Plaintiff's military records. The Second District granted certiorari and quashed the Order finding that the trial court departed from the essential requirements of law and requiring disclosure of Plaintiff's military records without conducting an *in camera* examination to segregate relevant documents from private, irrelevant documents.

Damsky v. University of Miami, 166 So. 3d 930 (Fla. 3d DCA 2015)

The trial court entered an Order allowing the University of Miami and their counsel to engage in *ex parte* communications with an employed treating physician who was a non-party to the litigation. After an evidentiary hearing, the trial court

determined the physician was an employee of the University and, therefore, concluded that such communications were not prohibited under Florida Statute 456.057. As such, the Petition for Certiorari was denied.

Eyec Trucking, LLC v. Santos, 166 So. 3d 952 (Fla. 4th DCA 2015)

The Fourth District granted certiorari and ruled that the trial court must first rule on objections to discovery prior to requiring the filing of a privilege log.

Plantz v. John, 170 So. 3d 822 (Fla. 2d DCA 2015)

The Plaintiff filed a medical negligence and wrongful death complaint against Dr. Plantz; an emergency room physician. Plantz filed a Motion to Dismiss, which remains pending, asserting that the Plaintiff did not comply with the presuit notice requirements and specifically alleged that the Plaintiff's expert was not qualified to offer opinions against him and that the expert did not conduct a complete review of available records in forming his opinions corroborating the grounds to support Plaintiff's claim.

While the Motion to Dismiss was pending, Plantz commenced formal discovery concerning the expert's credentials. The discovery included two depositions of the expert totaling 13 hours. Plantz also requested non-party hospitals to produced records of the experts status at those facilities and also requested the Plaintiff's trial counsel produce all prior Notices of Intent to initiate litigation which contained verified medical expert opinions signed by the same expert.

The Plaintiff objected and following a hearing, the objections were sustained. Plantz then filed a Petition for Certiorari which the Second District dismissed for lack of jurisdiction. In doing so, they stated that "it is unclear to this court whether Dr. Plantz has a legal right to engage in discovery as to the credentials of a person who merely signs a presuit Affidavit and is not currently listed as an expert witness expected to testify at trial." They also noted that any possible error in denying the discovery will not result in material injury because Plantz will have the opportunity to raise the issue via certiorari in the event his pending Motion to Dismiss is denied.

Eller Stevedoring Company, LLC v. Pandolfo, 173 So. 3d 994 (Fla. 3d DCA 2015)

The trial court entered an order compelling a litigant's in-house attorney to be deposed. He was not the attorney of record, but was directly involved in the litigation. The Third District granted certiorari and quashed the order and noted that such depositions should be "limited to where the parties seeking to take the deposition has shown that (1) no other means exist to obtain the information other than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case." In this case, the attorney who counsel sought to depose was directly involved in the litigation having both directed and overseen various aspects of Eller's investigation of the accident and had also received documentation including attorney/client privileged communication and work product documents related to the investigation.

Seaboard Marine Limited v. Clark, 174 So. 3d 626 (Fla. 3d DCA 2015)

Plaintiff was an employee of Stevedoring Company who was injured while working at Seaboard's terminal at the Port of Miami. During the loading process of cargo containers on to ships, a top loader operated by another employee of the Stevedoring Company ran over Clark and crushed his legs which were later amputated. Clark then sued Seaboard and the owner of the terminal.

Immediately following the accident, attorneys for Seaboard and other Seaboard representatives took 91 post-accident photographs of the area in which the accident occurred. In addition to these photographs, Seaboard preserved approximately 90 minutes of surveillance footage of the terminal from the night of the accident.

The footage was taken from a camera stationed approximately 100 feet from the location of the accident. The surveillance footage depicts the location of the containers within the terminal, the terminal layout, the top loaders working in the accident area, as well as a somewhat distant view of the accident itself.

The surveillance footage was turned over to Clark's counsel before Clark brought his action against Seaboard and the owner of the terminal. Seaboard declined to provide Clark with the 91 post-accident photographs asserting work product and attorney client privilege.

Following the filing of the lawsuit, Clark sought the photographs to which Seaboard objected. Seaboard filed an appropriate privilege log. Clark then filed a Motion to Compel the production of the photographs whereupon Seaboard responded and provided the trial court with the photographs for an in-camera inspection.

The trial court then entered an Order granting Clark's Motion to Compel finding that the photographs were relevant to the issues in the lawsuit and that Clark had no other means of obtaining the photographs. At the time the motion was heard by the trial court, no witnesses had been deposed nor did Clark present any evidence at the hearing indicating that Clark had attempted to obtain any post-accident photographs taken by either the owner of the terminal or Clark's employer.

The Third District granted certiorari finding that the trial court improperly entered the order compelling the disclosure of the post-accident photographs because the Plaintiff had failed to exercise due diligence to obtain substantially equivalent materials to the privileged documents. The Third District concluded that "no doubt the photographs are relevant; they might be highly probative to the critical issues in the case. Rule 1.280 (b)(4), however, establishes a much higher bar than mere relevancy to obtain such privileged work-product materials developed by an adversary. The party must first diligently exhaust other means of obtaining the substantial equivalent." Because the record was devoid of such diligence, certiorari was granted.

Bartow HMA, LLC v. Edwards, 175 So. 3d 820 (Fla. 2d DCA 2015)

Plaintiff filed an Amendment 7 Request for Production. In response thereto, the hospital provided the Plaintiff with documents related to internal peer review but objected to production of external peer review reports. The hospital argued that the external peer review reports did not fall within Amendment 7 because they were not "made or received in the course of business." Rather, they were generated in response to letters sent by the hospital's attorney to the director of client services at a business called "M.D. Review."

On behalf of the hospital, its counsel requested that "M.D. Review conduct an external peer review concerning the medical care and treatment rendered by one of its physicians [name and specialty] to [number] different patients at the facility.

We are requesting this external peer review investigation to be done on an attorney/client, work product and peer review privilege basis." Counsel then included medical records from certain specified patients. The hospital consistently maintained that counsel requested the reports at issue for purposes of litigation.

The Second District granted certiorari, finding that the external peer review reports were not "made or received in the course of business." They also found that on the limited record before the Court, the reports were not obtained as part of the hospital's regular peer review process and were not obtained in an attempt to circumvent the disclosure requirements of Amendment 7 noting that the hospital had already satisfied those requirements by providing access to numerous documents pertaining to internal adverse incident reporting and peer review. The court added, however, that the results reached may have been different if the hospital had not conducted an internal peer review of the incidents in question.

Publix Supermarkets, Inc. v. Hernandez, 176 So. 3d 350 (Fla. 3d DCA 2015)

The Plaintiff sued Publix for personal injuries she sustained as a result of a slip and fall. Included in the claim were past and future medical expenses. The Plaintiff was treated by a physician at Performance Orthopedics and Neurosurgery which later became known as Calhoun Orthopedics and Neurosurgery. A physician performed the spinal surgery on her at Palm Springs General Hospital and, during the course of discovery, Publix obtained two conflicting invoices for the Plaintiff's hospital care.

One hospital invoice indicated that the total hospital bill was $18,709 and was paid in full by a payment of $6,490 from an entity identified as "Performance Orthopedics." A second hospital invoice indicated that the total hospital bill was $54,233 and was paid in full by a payment of $12,384 from an entity identified as "Peachtree Funding." At a deposition, the hospital's billing supervisor testified that the two invoices were for the same services and added that the invoice for $18,709 was the correct one and could not explain how or why the other invoice was generated.

Following the deposition, Publix issued subpoena duces tecum for deposition to the records custodian of Performance and Calhoun and requested documents pertaining to dealings with various Peachtree entities relating to the medical treatment of Ms. Hernandez. The Plaintiff objected and the trial court

sustained the objections. In an unusual decision, the Third District granted certiorari noting that an order prohibiting the taking of a material witness' deposition inflicts the type of harm that cannot be remedied on final appeal.

City of Port St. Lucie v. Follano, 177 So. 3d 301 (Fla. 4th DCA 2015)

Follano sued the City for negligence after stepping into an uncovered sewer valve access pipe up to her knee. The City took photographs of the area on the day of the incident after Follano was extracted by the Fire Department. The photographs showed the uncovered pipe, but the City claims that the surrounding area had been altered significantly by the fire fighters. Follano took photographs of the area the next day, but the pipe had been covered by that time.

Once suit was filed, Follano moved to compel production of the City's photograph and the City claimed work product privilege. She argued that the City's photographs were the only available evidence of how the pipe appeared on the day of the incident. The trial court granted the motion without reviewing the City's photographs simply finding that "the photographs cannot be obtained by any other measure."

The Fourth District granted certiorari finding that the trial court departed from the essential requirements of the law by compelling production of the photographs of the accident scene without conducting an *in-camera* review. As the court explained, an *in-camera* review was necessary to determine whether the photographs provided an evidentiary value which the Plaintiff claims and is also necessary to determine whether substantially equivalent photographs could be obtained without undue hardship.

Walter v. Sunrise Senior Living Services, Inc., 177 So. 3d 630 (Fla. 2d DCA 2015)

The trial court struck Plaintiff's request for trial by jury based upon an express waiver of jury trial in a nursing facility residency agreement signed by the decedent. The Plaintiff sought certiorari review which was denied by the Second District citing to Florida Supreme Court precedent which holds that an order striking demand for a trial by jury is not reviewable by certiorari. The Second District added that if the Plaintiff believes that she is aggrieved by the order after the conclusion of a non-jury trial, she is free to raise the issue on direct appeal.

Brannon v. Palcu, 177 So. 3d 693 (Fla. 4th DCA 2015)

Palcu sought information to demonstrate that Dr. Brannon perpetuated a fraud or obstructed justice when he testified in his criminal case. Palcu then sought discovery from Brannon including a specific e-mail string between Brannon and his attorneys. The trial court conducted an *in-camera* review of the e-mail string and ordered that it be produced. Brannon filed a Petition for Certiorari arguing that the trial court was required to conduct an evidentiary hearing before ordering the production. The Fourth District granted the Petition for Certiorari and ordered the trial court to conduct an evidentiary hearing to allow the petitioners to argue why the crime-fraud exception should not apply.

***Daubert* Standard Did Not Exclude Expert's Opinions**

Baan v. Columbia County, 40 FLWD 2707 (Fla. 1st DCA 12/8/15)

Columbia County Paramedics responded to a 911 call for a child in respiratory distress. The parties agreed that the EMS personnel left the scene within 10 minutes of arrival after showing the child's aunt how to use a nebulizer. A neighbor testified by Affidavit and by deposition that she held the child over her shoulder during the entire time that EMS personnel were on the scene during their first visit and that paramedics did not conduct any examination of the child and didn't even touch him.

By contrast, the EMS report documented an examination and normal vital signs. The report also indicated that EMS personnel were told that the child had earlier been diagnosed with asthma and concluded that he might have been suffering an asthma attack before they arrived. They also noted that the child had throat congestion which he cleared upon coughing and that his lungs sounded clear.

Approximately 50 minutes after they left, another 911 call was made advising that the child was not breathing at all. A different neighbor who was a trained ENT found the child lying on the floor face up with his face turning blue. He then turned the child over to allow copious amounts of mucus and fluid to drain from his mouth and nose. On arrival, the EMS personnel made attempts to resuscitate the child. They were unable to find a pulse and airlifted him to a nearby hospital where he was pronounced dead the following day.

Plaintiff's emergency medicine expert concluded that EMS breached the prevailing standard of care by failing to place the child in an ambulance during the first run and take him to a hospital for evaluation and treatment. He also concluded that, had the standard of care been met, he would have been treated for lack of oxygen and would have survived. He noted that this failure to do so violated their own treatment protocols for respiratory distress and concluded that his respiratory condition deteriorated after EMS failed to transport the child until the airway was obstructed by mucus, congestion, and "more likely than not" bronchospasm.

Columbia County moved to exclude the expert testimony arguing that it was unreliable under the *Daubert* standard. Specifically, they argued that his testimony was essentially based upon an assumption that because the child experienced a respiratory arrest within one hour after the first EMS call, he must have been experiencing a detectible respiratory problem at the time of the first call. The trial court granted the motion and the First District reversed analyzing this testimony both under *Frye and Daubert*. They noted that under *Daubert*, although "an expert may be qualified by experience," it does not follow "that experience, standing alone, is a sufficient foundation rendering reliable any conceivable opinion the expert may express."

The First District added that, the expert's opinions were based upon his review of the child's medical records, the autopsy report, the EMS records and statements from witnesses who observed the child in the last hours and minutes of his life. Further, the Emergency Department expert relied upon his first-hand knowledge of children's respiratory problems, his 30-years experience as an Emergency Department physician and his 25-years as an advisor to other Fire Rescue Departments, as well as, the Department's own treatment protocol.

The Appellate Court noted that the Plaintiff did not argue that the amendment to the Florida Evidence Code which adopted the *Daubert* standard affected a change in procedure which must first be adopted by the Florida Supreme Court. The court suggested that a constitutional challenge to the *Daubert* standard might have resulted in a Frye-based analysis.

Default Judgment Entered Was A Proper Sanction

Briarwood Capital, LLC v. Lennar Corporation, 160 So. 3d 544 (Fla. 3d DCA 2015)

The Third District affirmed and found no abuse of discretion in entering a default against the Defendant due to the Defendant's willful discovery violations, including deletion of emails, concealment of material witnesses, lying during depositions and providing false testimony before the trial court.

Entitlement to Attorney's Fees Is Not Appealable

Tower Hill Prime Insurance Company v. Torralbas, 176 So. 3d 374 (Fla. 3d DCA 2015)

The insurance company appealed an order determining Torralvis' entitlement to attorney's fees and costs. The Third District dismissed the appeal because an order that merely determines the entitlement to attorney's fees without actually awarding an amount of fees is not final and, therefore, is not appealable.

Equitable Subrogation

Allstate Insurance Company v. Theodotou, 171 So. 3d 163 (Fla. 5th DCA 2015)

Hintz was riding his scooter when he sustained catastrophic head injuries as a result of an accident with Emily Boozer. Boozer was driving her father's car at the time of the accident which was insured by Allstate. Following the accident, Hintz was treated by several healthcare providers where, according to his Complaint, his injuries were severely exacerbated by medical negligence. Thereafter, Stalley, as guardian of Hintz, sued the Boozers for damages resulting from that accident. Stalley successfully argued that the doctrine espoused in *Stuart v. Hertz Corp*. precluded the Boozers from presenting evidence that medical negligence was a contributing cause of his injuries. The Boozers were ultimately held liable for all damages and a judgment was entered in excess of $11,000,000. Allstate then paid Stalley its policy limits of $1,100,000 with the remainder of the judgment remaining unpaid.

After the personal injury verdict was rendered, but before final judgment was entered, Stalley filed a separate medical malpractice lawsuit against the various healthcare providers and sought recovery for the very same injuries involved in the initial lawsuit against the Boozers. He also filed a bad faith action against Allstate which remains pending. After Allstate and Boozer were granted leave to intervene in Stalley's medical malpractice lawsuit, they each filed Complaints in that case claiming that they were entitled to equitable subrogation from the medical providers. The medical providers moved to dismiss the Complaints arguing that the Appellants were barred from seeking equitable subrogation because they had not paid the entirety of Hintz's damages.

The trial court granted the Motions to Dismiss and dismissed the Complaints with prejudice. The Fifth District reversed and stated that the right to equitable subrogation arises when payment has been made or judgment has been entered, so long as the judgment represents the victim's entire damages. They also certified this question to the Florida Supreme Court: "is a party that has had judgment entered against it entitled to seek equitable subrogation from a subsequent tortfeasor when the judgment has not been fully satisfied?"

Error To Order Deposition Of Litigant's In-House Attorney

Eller Stevedoring Company, LLC v. Pandolfo, 173 So. 3d 994 (Fla. 3d DCA 2015)

The trial court entered an order compelling a litigant's in-house attorney to be deposed. He was not the attorney of record, but was directly involved in the litigation. The Third District granted certiorari and quashed the order and noted that such depositions should be "limited to where the parties seeking to take the deposition has shown that (1) no other means exist to obtain the information other than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case." In this case, the attorney who counsel sought to depose was directly involved in the litigation having both directed and overseen various aspects of Eller's investigation of the accident and had also received documentation including attorney/client privileged communication and work product documents related to the investigation.

Facebook Discovery

Nucci v. Target Corporation, 162 So. 3d 146 (Fla. 4th DCA 2015)

Plaintiff slipped at a Target store and claimed physical injury. Before taking the Plaintiff's deposition, Target's lawyer viewed the Plaintiff's Facebook profile and saw that it contained 1285 photographs. At her deposition, Plaintiff objected to disclosing her Facebook photographs. Target's lawyer examined the Plaintiff's Facebook profile after the deposition and saw that it now only listed 1249 photographs. As a result, Target moved to compel inspection of the Plaintiff's Facebook profile and requested that she not destroy further information posted on her social media websites. Target argued that it was entitled to view the profile because her lawsuit put her physical and mental condition at issue.

In response to the motion, the Plaintiff explained that since its creation, her Facebook page had been on a privacy setting that prevented the general public from having access to her account. She claimed a reasonable expectation of privacy regarding her Facebook information. The trial court conducted hearings on the matter during which time Target showed the Court photographs from a surveillance video in which the Plaintiff could be seen walking with two purses on her shoulders and also carrying two jugs of water. The trial court ultimately granted Target's Motion to Compel Production.

The Plaintiff filed a Petition for Certiorari which the Fourth District denied. The Fourth District refused to grant certiorari noting that the trial court did not depart from the essential requirements of the law by compelling the Plaintiff to produce photographs from her social network account for a period commencing 2 years prior to the accident at issue through the present finding that the order was appropriately narrow in scope and that the photographs were reasonably calculated to lead to the discovery of admissible evidence relating to the Plaintiff's claim for intangible damages. They further held that any expectation of information shared through social networking websites is private is unreasonable and that the Stored Communications Act which prevents "providers" of communication services from divulging private communications to certain entities and/or individuals does not apply to the individuals who use the communication service provided.

Fifth Amendment Privilege

Vaygensberg v. Barash, 156 So. 3d 556 (Fla. 3d DCA 2015)

The trial court entered an Order granting a Motion to Compel discovery in aid of execution on a money judgment previously entered against Vaygensberg in favor of Barash. During his deposition, Vaygensberg asserted his Fifth Amendment right to refuse to answer questions regarding his income and whether he filed Federal Income Tax Returns for the immediate preceding six years. He also invoked his Fifth Amendment right in response to a Request for Production asking for Federal Income Tax Returns for the same years.

Barash then filed a Motion to Compel and, after conducting two hearings on the motion, the trial court entered an Order granting the Motions to Compel. Vaygensberg then filed a Petition for Certiorari which the Third District denied noting that in addition to not providing transcripts of the hearings, there was an absence of an evidentiary basis to support his "unadorned assertion of a Fifth Amendment claim."

As the Third District noted, "it is the duty of the trial judge, rather than the right of the litigant, to determine the propriety of such an invocation of the privilege. The litigant's assertion of the privilege must be supported by a showing sufficient for the trial court to determine that the litigant has 'reasonable grounds to believe that direct answers to deposition…questions would furnish a link in the chain of evidence needed to prove a crime against him.'"

Forum Non Conveniens

Hall v. Animals.Com, LLC, 171 So. 3d 216 (Fla. 5th DCA 2015)

The Fifth District reversed the trial court's decision in transferring venue from Lake County to Miami-Dade County on the basis of *forum non conveniens* because the Defendant's Motion to Transfer was based upon the impropriety of Plaintiff's selection of venue and it was only at the hearing on the motion that the Plaintiff learned that the motion was based upon *forum non conveniens.* As such, the Fifth District stated that it was error for the trial court to entertain the argument without giving the Plaintiff advanced notice.

Fraud On The Court

Jimenez v. Ortega, 179 So. 3d 483 (Fla. 5th DCA 2015)

The District Court held that the trial court erred by failing to dismiss the Plaintiff's claims for pain and suffering and loss of earnings where the Plaintiff, in three separate depositions, gave false or misleading answers to questions concerning the extent, duration, and severity of his pain and suffering and his ability to work. It should be noted that the Plaintiff admitted many of his false statements in his trial.

Middleton v. Hager, 179 So. 3d 529 (Fla. 3d DCA 2015)

The Plaintiff was a passenger in a vehicle struck by the Defendant. Following discovery, the Defendant moved to dismiss the Complaint for fraud on the Court. A hearing was held by a General Magistrate. During the hearing, it became clear that the Plaintiff had misrepresented that she had been involved in prior automobile accidents, misrepresented that she had ever complained of neck or back pain or of numbness or tingling in her arms or legs; misrepresented that she had never been seen by an orthopedist, neurologist, neurosurgeon or pain management physician; misrepresented that she never had x-rays, a CT scan or an MRI on her neck or back prior to the accident; misrepresented that the first time she ever felt numbness in her hands was following the accident; and denied that she ever received physical therapy prior to the subject accident except for a twisted ankle many years earlier.

Following an evidentiary hearing, the magistrate made a determination that the Plaintiff's sworn answers in discovery were false and not the result of poor memory or confusion and that her misleading and false discovery responses resulted in an almost successful effort to mislead the Defendants and interfere with their ability to determine the truth about a prior collision. The magistrate also found that the Plaintiff did not offer any corroborating testimony about her loss of memory of events prior to the accident; that her discovery responses were not mere inconsistencies or failures to remember, but rather, she was simply not credible. Despite this, the magistrate denied the Motion to Dismiss for Fraud concluding that the Plaintiff's discovery misconduct fell just short of proving that there was a deliberate scheme to divert the judicial process.

The Defendant timely filed exceptions to the magistrate's report and recommendation and the trial court then entered an order dismissing the case for fraud on the Court. The Third District affirmed. In doing so, it noted that once the trial court appointed a magistrate to take testimony and make findings, it lost the prerogative of substituting its judgment for that of the magistrate, however, it added that the trial court did not re-weigh the evidence or substitute its findings for those of the magistrate, but rather correctly determined that the magistrate had misconceived the legal affect of the evidence and that the case was ripe for dismissal for fraud on the Court.

If Not A Proper Party, Don't Engage In Discovery

May v. HCA Health Services of Florida, Inc., 166 So. 3d 850 (Fla. 2d DCA 2015)

The Plaintiffs originally sued Blake Medical Center Auxiliary as a Defendant. During the pendency of the case, the Auxiliary filed a Motion for Summary Judgment asserting that it was entitled to judgment because it was not a health care provider and did not employ healthcare professionals. The Auxiliary and the Plaintiffs then entered into a stipulation for the Medical Center to be substituted for the Auxiliary as a Defendant. Once the Medical Center became a Defendant in the case, it filed a Motion for Summary Judgment arguing that the statute of limitations had run against it. The trial court granted Summary Judgment.

The Second District reversed and found that the mistake in naming the proper Defendant was merely a misnomer and that all parties knew that the Plaintiff intended to sue the Medical Center and that there was a substantial identity of interest between the Medical Center and the Auxiliary. While the District Court noted that a Defendant has no obligation to advise a Plaintiff on whom to sue, it also noted that the Auxiliary had engaged in extensive discovery and did not reveal that it was not the proper Defendant until after the statute of limitations had run. They further found that the Plaintiff was not at fault for failing to inquire further after the original Defendant made a statement in its first affirmative defense that it was "not a proper party to this action" because this assertion was legally insufficient and inconsistent with its conduct in engaging in discovery.

IME's

Grabel v. Sterrett, 163 So. 3d 704 (Fla. 4th DCA 2015)

Plaintiff filed an uninsured motorist claim and, thereafter, sought to depose the doctor who performed the Compulsory Medical Examination for the insurance company. The subpoena requested the doctor to bring various items to his deposition. The doctor objected to certain items and State Farm also moved for protective order asserting the same objections. The Court overruled the objections to three specific requests which included: (1) copies of all billing invoices submitted by the doctor to defense counsel, defense counsel's firm and the Defendant's insurer (State Farm) for a total of 6 years; (2) a document and/or statement that includes the total amount of money paid by or on behalf of the Defendants and/or their attorneys and/or the defense law firm including any predecessor and/or successor law firm and any of the attorneys presently or formerly employed at the law firm and the Defendants' insurer to the doctor for expert work over the 6 years; and, (3) all documents evidencing the amount or percentage of work performed by the doctor on behalf of any Defendant and/or defense law firm and/or insurance carrier for 6 years including time records, invoices, 1099's and other income reporting documents.

The trial court overruled the objections but limited the request to 3 years. The trial court did not address the doctor and the insurer's objection that the discovery exceeded that allowed by Florida Rule of Civil Procedure 1.280(b)(5)(A)(iii) and did not find "unusual or compelling circumstances" but merely compelled the discovery. The Fourth District granted certiorari finding that the trial court departed from the essential requirements of the law by allowing discovery of financial information that exceeded the scope of discovery permitted under the Florida Rule of Civil Procedure without finding unusual or compelling circumstances.

Grabel v. Roura, 174 So. 3d 606 (Fla. 4th DCA 2015)

The trial court found that there were inconsistencies between Interrogatory answers provided by defense counsel and deposition responses provided by Dr. Grabel, the defense expert witness concerning the percentage of income the doctor derived from working as an expert witness and the number of times he had testified for Plaintiffs and Defendants in personal injury litigation. The Fourth District granted certiorari and found that the disputed discovery exceeded the provisions of

Florida Rule of Civil Procedure 1.280 which limits discovery to an approximation of the expert's involvement as an expert witness.

The court noted that the trial court allowed the Plaintiff to issue subpoenas to 20 non-party insurance carriers not shown to have any involvement in the litigation. The subpoenas required production of financial records including tax records showing the total amount of fees paid to the doctor for expert litigation services since 2009. The court pointed out that the rule expressly provides that "the expert shall not be required to disclose his or her earnings as an expert witness."

Bodzin v. Leviter, 174 So. 3d 608 (Fla. 4th DCA 2015)

A non-resident Defendant, who had not sought affirmative relief, was ordered by the trial court to appear for an independent medical examination in Florida in order to determine his capacity to testify after his counsel alleged that he was incapacitated by Alzheimer's. The court noted that the Defendant had given multiple depositions in the case without having raised incapacity to testify at those depositions and that the Plaintiff had already received the Defendant's medical records and retained an expert to review the records and form an opinion as to the Defendant's capacity. As such, they granted certiorari and quashed the trial court's order.

***In Camera*/Evidentiary Hearing Not Required When Non-Party Objects To Production**

Bianchi & Cecchi Services, Inc. v. Navalimpianti USA, Inc., 159 So. 3d 980 (Fla. 3d DCA 2015)

A non-party was served with a subpoena and it objected to production of financial documents. The trial court entered an order requiring the non-party to produce the requested documents and the non-party then sought certiorari relief arguing that the trial court departed from the essential requirements of law by entering its order without conducting an evidentiary hearing and *in-camera* review of the financial records.

The Third District rejected this position and noted that when a non-party objects to the production of allegedly confidential records, the trial court is required to weigh the requesting party's need for those records against the privacy

interests of the objecting non-party. It added that, while conducting an evidentiary hearing or an *in-camera* review is generally the appropriate mechanism for assisting the trial court in balancing these competing interests, they declined to create a rule which would require the trial court to do so.

Medicaid Liens

Mobley v. State of Florida, 40 FLWD 2816 (Fla. 1st DCA 12/18/15)

Following a near drowning, Plaintiffs' parents brought suit on his behalf against various Defendants involved in the incident. Past medical expenses totaled $627,804. Of this amount, $515,860 was paid by a self-funded ERISA plan and $111,940 was paid by Medicaid. The claim eventually settled for $500,000. The ERISA plan asserted a lien for the full amount of its medical expenses, but it agreed to accept $120,000 in satisfaction of its lien. AHCA asserted a lien in the full amount of the Medicaid expenses.

The Plaintiff then filed a petition to determine the proper amount of the Medicaid lien. The Administrative Law Judge added the $120,000 paid to the ERISA plan to the $20,718 allocated for other medical expenses paid by Medicaid to reflect a total amount of $140,718 allocated for past medical expenses. The ALJ concluded that the Plaintiff failed to prove by clear and convincing evidence that the statutory lien amount of $111,944 exceeded the amount actually recovered in the settlement for medical expenses and as such he ordered that AHCA was entitled to a full reimbursement of the Medicaid lien.

The First District reversed and found that it was error to include the ERISA settlement amount as part of the medical expense allocation. The case was remanded with instructions not to consider the ERISA settlement as part of the medical expense allocation and to determine whether, without the ERISA settlement, the Medicaid recipient proved by clear and convincing evidence that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses rather than the amount calculated by the statutory formula.

Agency for Healthcare Administration v. Hunt, 165 So. 3d 868 (Fla. 1st DCA 2015)

ACHA paid medical expenses associated with neurological injuries sustained at birth by the Plaintiff. AHCA subsequently recorded a Medicaid lien and the Plaintiff filed a wrongful death action against various healthcare providers arising out of the child's death. The Plaintiffs ultimately received a substantial settlement from the litigation, including sums attributable to the medical expenses. After settlement, the parties disputed the amount that AHCA should be reimbursed for Medicaid-provided medical assistance.

Pursuant to Florida Statute §409.910(17)(b), the Plaintiffs placed the settlement funds in an interest bearing account for the benefit of AHCA and filed a Petition with the Division of Administrative Hearings contesting the amount designated as a recovered medical expense damages payable to the Agency. Plaintiffs asked DOAH to limit AHCA's recovery based upon the amount the Estate recovered, as well as, the costs it incurred.

At that final hearing, however, the Plaintiffs argued for the first time that AHCA should receive nothing at all because its lien had expired and it had not sought to enforce its subrogation and assignment rights. The DOAH Judge agreed with the Plaintiffs and awarded AHCA nothing. The First District reversed noting that when the Plaintiffs invoked DOAH's jurisdiction, many months before the Statute of Limitations had expired, they did not attack AHCA's right to reimbursement. Rather, they conceded an obligation to reimburse AHCA out of the settlement funds designated for medical expenses.

Suarez v. Port Charlotte HMA, LLC., 171 So. 3d 740 (Fla. 2d DCA 2015)

The Plaintiff filed a medical malpractice action against seven Defendants. The Plaintiff sought recovery against the Defendants for her daughter's permanent and catastrophic injury sustained during birth. Following a settlement reached with one of the Defendants, the trial court approved the settlement, and, in the same order, approved the Guardian Ad Litem's recommendation to allocate a certain amount for past medical expenses. The record below was unclear as to whether the Plaintiff gave AHCA notice of the settlement as required by Florida Statute 409.910(11)(d).

The Plaintiff then filed an emergency Motion for Determination of Medicare Lien seeking an Order directing AHCA to accept the trial court's prior allocation. After a hearing, the trial court quashed the motion, finding that it lacked jurisdiction over the dispute regarding the lien based upon Florida Statute 409.910(17)(b). The Second District affirmed finding that Florida Statute 409.910 was amended in 2013 and that, prior to the amendment, Medicaid recipients were able to challenge the amount of the settlement designated as a recovery for past medical expenses by filing a motion in the Circuit Court. After the 2013 amendment, recipients must now bring their challenges by petition to the Division of Administrative Hearings.

Medicare Act Preempts Florida's Subrogation Laws

Humana Medical Plan, Inc. v. Reale, 40 FLWD 2678 (Fla. 3d DCA 12/2/15)

The Plaintiff was injured in a slip and fall and eventually settled her claim with the property owner. Sufficient funds were set aside to reimburse conditional payments made by Humana for its Medicare Advantage Plan payments. Following the settlement, Humana presented Plaintiff's counsel with a payment report and advised her that it was entitled to reimbursement of the full amount of conditional Medicare payments it provided.

Counsel declined to reimburse Humana in the amount requested and did not initiate an administrative appeal of Humana's determination. Subsequently, Humana brought an action against the Plaintiffs and her counsel seeking reimbursement of the payment pursuant to the Medicare Secondary Payor Act. The Plaintiffs moved to dismiss for lack of subject matter jurisdiction on the theory that the Medicare Act did not provide Humana with an express or implied right of action for reimbursement. The court granted the motion. Humana then filed a motion to amend or correct the Order of Dismissal which was partially granted.

The District Court vacated its order and scheduled a hearing on Humana's motion whereupon Humana dismissed the action for recovery against the Plaintiff and her attorney and instead brought a Federal action for reimbursement against the Condominium's liability insurer which had funded the settlement. The District Court subsequently entered an order granting Humana's Motion for Summary Judgment finding that Humana could maintain a private right of action for double damages against the insurance company pursuant to 42 USC §1395y(b)(3)(A).

The insurance company subsequently appealed the summary judgment and Humana's reimbursement claim remained unsatisfied at the time that this opinion was issued.

While the initial Federal action for reimbursement that Humana brought against Plaintiff and her counsel was pending, the Plaintiff brought an action in the Circuit Court of Miami-Dade County for a declaration of Humana's right to reimbursement asserting that Humana's payments constituted a collateral source of indemnity and that Florida's collateral sources of indemnity statute (Florida Statute §768.76) and not Medicare's Secondary Payor Act provided Humana's right of recovery. Humana moved to dismiss the claim for lack of subject matter jurisdiction. Ultimately, the trial court ruled in favor of the Plaintiff, however, the Third District reversed.

The Third District held that there was a lack of subject matter jurisdiction because the insured failed to exhaust the mandatory administrative remedies. Further, even if exhaustion of administrative remedies had occurred, the Third District ruled that the claim was subject to Federal jurisdiction. It further held that Florida's collateral source statute was inapplicable to a Medicare Advantage Organization's right to reimbursement because Florida's subrogation laws are expressly preempted by the Medicare Act.

Motion To Amend Complaint After Defendant Filed Motion for Summary Judgment

Grover v. Karl, 164 So. 3d 1285 (Fla. 2d DCA 2015)

Grover fell and was injured when a fight broke out at Karl's business. In the original Complaint, the Plaintiff alleged that she fell when another patron intentionally attacked her. At deposition, however, she testified that she fell when a fight among other patrons resulted in the manager getting shoved and then unintentionally falling on her. The Defendants moved for Summary Judgment based upon her testimony arguing that the allegations of her Complaint contradicted her testimony and there was no material dispute that the Defendants had notice of the danger or an opportunity to prevent it.

Shortly before the hearing on the Summary Judgment motion, the Plaintiff filed a Motion for Leave to file her Amended Complaint. The Second District

reversed and found it was an abuse of discretion to deny the leave to file the Amended Complaint which revised the basic facts of what happened to the Plaintiff without consideration as to whether the proposed Amended Complaint was prejudicial, abused the privilege to amend or was futile and also, noted that the trial court's finding that the revised version of events contained in the proposed amendment was "too attenuated" with respect to the original claims was not a sufficient basis to deny the leave to amend.

No Settlement Due To Added Terms

Pena v. Fox, 40 FLWD 2573 (Fla. 2d DCA 11/13/15)

Following a motor vehicle accident, Plaintiff's counsel requested policy limits from the Defendant's insurer advising that the Plaintiff would execute a release only as to the insured adding that "any attempt to provide a release which contains a hold harmless or indemnity agreement, which releases anyone other than your insured, or which releases any claim other than my client's claim, will act as a rejection of this good faith offer."

Following its receipt of this, the Defendant's insurance company issued a release which specifically released the insured, his heirs, executors and assigns and subsequently shifted its reference to "releasee(s)" without defining the term. The trial court found that there was a settlement, however, the District Court reversed finding that the additional terms including "releasee(s)" without defining the term improperly added parties beyond those that the Plaintiff proposed to release and materially deviated from the limitation clearly expressed in Plaintiff's offer. As such, there was no meeting of the minds and no settlement.

Objections Come First; Then Privilege Log

Eyec Trucking, LLC v. Santos, 166 So. 3d 952 (Fla. 4th DCA 2015)

The Fourth District granted certiorari and ruled that the trial court must first rule on objections to discovery prior to requiring the filing of a privilege log.

Order Enforcing Mediation Agreement Reversed

Gardner v. Wolfe & Goldstein, P.A., 168 So. 3d 1281 (Fla. 4th DCA 2015)

The trial court granted a Motion to Enforce a Mediation Settlement Agreement even though a party never agreed to the settlement and did not sign a mediation agreement. The Fourth District held that this was error and reversed.

Proposal for Settlement

Three Lions Construction, Inc. v. The Namn Group, Inc., 40 FLWD 1703 (Fla. 3d DCA 7/22/15)

Defendant filed a Proposal for Settlement. Prior to expiration of the time within which it could properly accept Defendant's proposal, the Plaintiff filed a Motion for Extension of Time to accept the proposal for Defendant, however, the Defendant did not agree to the extension and the Plaintiff took no steps to have the motion heard. As such, the Third District ruled that the Plaintiff's Motion for Extension of Time was ineffective and it was error to deny Defendant's Motion for Attorney's Fees after Plaintiff voluntary dismissed the action when it was notified by the Defendant that its Notice of Acceptance of the Proposal for Settlement filed more than 90 days later was untimely.

Key West Seaside, LLC v. Certified Lower Keys Plumbing, 40 FLWD 2052 (Fla. 3d DCA 9/2/15)

Key West Seaside filed a Proposal for Settlement, following which a final judgment of no liability was entered in its favor. The trial court made no finding that Seaside's Offer of Judgment was not made in good faith but rather, denied the Motion for Attorney's Fees and Costs finding that a Co-Defendant was liable for payment of Defendant's attorney's fees pursuant to an indemnification agreement. The Third District reversed and found that this was an invalid reason for denying an award of fees pursuant to a proper Proposal for Settlement.

Russell Post Properties v. Leaders Bank, 159 So. 3d 348 (Fla. 3d DCA 2015)

The Third District found that a Proposal for Settlement was not ambiguous and, therefore, invalid because of the Defendant's failure to attach a proposed

Release where the offer names the parties who will execute the Release and precisely identify the claims which would be released. As such, the trial court erred in denying the Defendant's Motion for Attorney's Fees.

Vogan v. Cruz, 159 So. 3d 921 (Fla. 5th DCA 2015)

Vogan sued Cruz for injuries sustained in an automobile accident. In response, Cruz filed an Offer for Settlement in the amount of $5,001. Vogan rejected the offer and proceeded to trial wherein she obtained a verdict for $1,258. Following the verdict, Vogan moved to strike the offer arguing that it was ambiguous as to whether it would have extinguished a potential uninsured motorist and health insurance claims.

The trial court denied the Motion to Strike and entered final judgment in favor of Cruz. In reversing the trial court, the Fifth District cited part of the offer which states "the claims resolved by this offer are all actions, causes of action, demands for damages of whatever name or nature and tort, contact or by statute, in any manner arisen, arising to grow out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries resulting or to result from the accident, casualty or event which occurred…." The Fifth District found that this language essentially constituted a general release and implicated claims extrinsic to the litigation including the resolution of contractual and statutory claims. For that reason, they found the offer ambiguous and unenforceable.

Isias v. H.T. Hackney Company, 159 So. 3d 1002 (Fla. 3d DCA 2015)

A Proposal for Settlement was filed by an individual Defendant and two corporate Co-Defendants. All made nominal offers. The trial court found that the nominal offers of settlement of the Corporate Co-Defendants were not made in good faith. The Third District ruled that this was error finding that all three Defendants had an objectively reasonable basis to make a nominal offer.

The Third District also found that it was error to award the individual Defendant 1/3rd of the attorney's fees incurred in the defense of the case and denying any recovery of attorney's fees incurred in the defense of the case by the Corporate Co-Defendants where all three Defendants employed a single law firm to represent them and the same legal services benefited all three parties.

Floyd v. Smith, 160 So. 3d 567 (Fla. 1st DCA 2015)

Following a verdict in favor of the Defendant, the Plaintiff challenged a Proposal for Settlement that had been served upon her arguing that it failed to strictly comply with Florida Statute §768.79 and Rule 1.442 because it did not contain a certificate of service. The First District held that the current statute and rule do not require a certificate of service any longer and therefore found the Proposal for Settlement to be properly served. Further, the fact that the proposal referenced resolution of "his claims" when the Plaintiff was a woman did not render the proposal ambiguous because there was no one else but the Plaintiff who had asserted any claims in this action. Accordingly, the ruling in favor of the Defendant on his Motion for Attorney's Fees and Costs pursuant to the Proposal for Settlement was affirmed.

Pratt v. Weiss, 161 So. 3d 1268 (Fla. 2015)

Plaintiff filed a medical malpractice action against multiple Defendants including FMC Hospital, Limited, a Florida Limited Partnership d/b/a Florida Medical Center [FMC Hospital] and FMC Medical, Inc. f/k/a FMC Center, Inc., d/b/a Florida Medical Center [FMC Medical]. The Complaint alleged that these two entities "owned, operated, maintained and controlled" Florida Medical Center. The Plaintiff also alleged that FMC Hospital, Limited was a limited partnership and that FMC Medical, Inc. was a general partner of Florida Medical Center. The Complaint alleged two claims: negligent hiring/retention; and vicarious liability for the negligence of two doctors. These claims were made against each of the Defendants using exactly the same wording.

Subsequently, a Proposal for Settlement was filed on behalf of the Defendants, FMC Hospital, Limited, a Florida Limited Partnership d/b/a Florida Medical Center; and FMC Medical Inc. f/k/a FMC Center, Inc. d/b/a Florida Medical Center. Following a verdict in favor of the hospital, the hospital moved for attorney's fees and costs. The Plaintiff opposed the motion asserting that the entities were joint offerors and the proposal was invalid because it failed to apportion the amount offered. The hospitals responded that there was only a single offeror---Florida Medical Center ---and, therefore, apportionment of the amount offered was not required. The trial court agreed with the hospital and awarded attorney's fees.

The Fourth District affirmed and the Supreme Court quashed this decision finding that because this was a joint proposal, the amounts had to be allocated to each of the offering Defendants. "To the extent any alleged liability of FMC Hospital and FMC Medical could be viewed as coextensive, this does not constitute an exception to the apportionment requirement. Even where no logical apportionment can be made, it is nonetheless required where more than one offeror or offeree is involved."

Audiffred v. Arnold, 161 So. 3d 1274 (Fla. 2015)

Valerie Audiffred and her husband, Robert Kimmons, filed an action against Thomas Arnold due to injuries from a motor vehicle collision. Audiffred sought damages for her injuries and for vehicle repairs and Kimmons sought damages based upon a loss of consortium. During the litigation, Audiffred filed a Proposal for Settlement which would have resolved "any and all claims Plaintiffs have brought against the Defendant set forth in the Complaint in the above-captioned case and any other claim or claims that may have a risen as a result of the subject incident set forth in Plaintiff's Complaint, including attorney's fees and costs." The Proposal also included one amount for settlement.

The jury ultimately entered a verdict against Arnold which exceeded the amount of the Proposal, however, no money was awarded to Kimmons for his loss of consortium. Thereafter, the trial court granted attorney's fees and costs pursuant to the Proposal for Settlement and the First District reversed same. The Supreme Court approved the decision of the First District finding that this was a Joint Proposal for Settlement because it had the affect of settling claims by two Plaintiffs against one Defendant. Accordingly, for the Proposal to be valid, it was necessary for the amount offered to be apportioned between Audiffred and Kimmons.

Government Employees Insurance Company v. Ryan, 165 So. 3d 674 (Fla. 4th DCA 2015)

A Proposal for Settlement which spelled out that the settlement was for "One Hundred Thousand Dollars" but wrote in numerals "$50,000" was patently ambiguous and, therefore, it was error to award attorney's fees.

Rodrigo v. State Farm Florida Insurance Company, 166 So. 3d 933 (Fla. 4th DCA 2015)

The insured sued State Farm for denial of coverage for property damage to her condominium. During the pendency of the litigation, State Farm served a Proposal for Settlement which was rejected. Subsequently, judgment was entered in favor of State Farm and they filed a Motion to Tax Costs and attorney's fees pursuant to its Proposal for Settlement. The Fourth District ruled that there was no error in awarding State Farm attorney's fees because it prevailed in litigation regarding coverage when the Plaintiff rejected their Proposal for Settlement. They did find, however, that it was error to award costs to State Farm without making findings of fact as to whether the specific costs awarded were taxable, and, if not, why they were still being awarded.

Miley v. Nash, 171 So. 3d 145 (Fla. 2d DCA 2015)

This case arose from a car accident in which Kyle Miley, driving a vehicle owned by Glenn Miley collided with a vehicle driven by Martha Nash. Nash sued for bodily injuries and her husband, Garfield, sued for loss of consortium. Kyle Miley filed a Proposal for Settlement to Martha Nash in "an attempt to resolve all claims and causes of action resulting from the incident or accident giving rise to this lawsuit brought by Plaintiff, Martha Nash against Defendant, Kyle Miley. The proposal required that Martha Nash dismiss both Glenn and Kyle Miley from the lawsuit in exchange for payment. The proposal did not mention Garfield Nash or his pending loss of consortium claim.

Mr. Nash ultimately dropped his claim prior to trial and Martha Nash rejected the proposal. The verdict was far less than the proposal, however, the trial court subsequently denied a Motion Seeking Attorney's Fees finding that the Proposal for Settlement was deficient because it failed to specifically identify the claim or claims the proposal was attempting to resolve, failed to specifically address the pending loss of consortium claim, failed to state with particularity any relevant conditions, failed to specifically state the amount in terms of the proposal attributable to each party and required dismissal of Kyle Miley and Glenn Miley without designating the amount attributable to each Defendant.

The Second District found that the proposal was appropriate and reversed the trial court. In doing so, they stated that the proposal clearly identified the claim or claims the proposal was attempting to resolve. Further, there was no need to address the pending loss of consortium claim because this was a separate and distinct claim despite its derivative nature. Further, the proposal met the

particularity requirement because the relevant conditions of the proposal were included and sufficiently described. The District Court also found that it was error to find that this was a joint proposal. Rather, the language of the proposal showed that it was being made solely by Kyle Miley and even though the proposal required the Plaintiff to release both Kyle and Glenn Miley, this did not render the proposal a joint proposal.

Borden Dairy Company of Alabama v. Kuhajda, 171 So. 3d 242 (Fla. 1st DCA 2015)

The trial court granted the Plaintiff's Motion for Attorney's Fees pursuant to the filing of a Proposal for Settlement. The Fourth District reversed noting that the Plaintiff failed to strictly comply with the rule when she failed to state whether the offers included attorney's fees and whether attorney's fees were part of the legal claim. The court added that, even though the Plaintiff never sought attorney's fees in her Complaint, this did not provide a basis for excusing her failure to strictly comply with the rules governing Proposals for Settlement.

Wallen v. Tyson, 174 So. 3d 1058 (Fla. 5th DCA 2015)

The Defendant served a Proposal for Settlement on the Plaintiff which attached a release. The proposal stated that "a release that is approved by Defendant is attached to this Proposal for Settlement. Defendant is willing to consider any suggested changes to the release." The trial court eventually denied a request for attorney's fees pursuant to the proposal and the Fifth District reversed stating that the Defendant was willing to consider any suggested changes to the releases, even though this did not render the Proposal for Settlement unenforceable.

Feinzig v. Deehl & Carlson, P.A., 176 So. 3d 305 (Fla. 3d DCA 2015)

The trial court denied attorney's fees pursuant to a Proposal for Settlement claiming that there was an inconsistency between the mutual releasees attached to the Proposal and the identified offerors and offerees in the Proposals for Settlement. The Third District reversed and held that a Proposal for Settlement conditioned upon the execution of a standard release identifying typical affiliates of a party does not create an ambiguity rendering the Proposal for Settlement unenforceable. In other words, the inclusion of these non-parties as releasees

creates no inconsistency between the release and the offeree identified in the body of the proposal for settlement.

Punitive Damages

United Automobile Insurance Company v. Davis, 154 So. 3d 489 (Fla. 3d DCA 2015)

Plaintiffs are not entitled to discovery of Defendant's financial information until the trial court determines whether they have properly stated a claim for punitive damages. In this case, no determination had been made and, in fact, no claim for punitive damages had even been filed. Because the Defendant's financial information was not relevant to any disputed issues raised by any other claim, the Third District granted certiorari and quashed the Circuit Court's Order permitting this discovery.

Petri Positive Pest Control, Inc. v. CCM Condominium Association, Inc., 174 So. 3d. 1122 (Fla. 4th DCA 2015)

The trial court granted Plaintiff's Motion for Leave to assert a punitive damage claim. The Defendant sought certiorari review. On review, the Fourth District granted certiorari and quashed the trial court's order because neither the trial court's verbal comments nor written order demonstrated whether the trial court found that the Plaintiff demonstrated a reasonable basis for seeking punitive damages.

Relationship Between Attorneys And Treating Physicians Is Relevant

Worley v. Central Florida Young Men's Christian, 163 So. 3d 1240 (Fla. 5th DCA 2015)

In this slip and fall case, the Defendants sought information on how the patient was referred to a variety of healthcare providers. The Defendant first attempted to obtain the information from the Plaintiff and the treating doctors. In this case, the treating doctors were unsure as to how the patient was referred and in deposition, the Plaintiff confirmed that she was not referred by the Emergency Department that treated her, by another doctor or by a friend or relative.

Thereafter, the Defendants sought information regarding the relationship between the Plaintiff's counsel and these physicians.

The Fifth District denied certiorari and held that the Court Order which required Plaintiff's counsel to produce the names of any and all cases where clients were referred directly or indirectly by any attorney employed by the law firm to the treating physicians did not depart from the essential requirements of the law particularly where the Defendant had sufficiently demonstrated a good faith basis for suspecting that a referral relationship existed between the treating physicians and the Plaintiff's attorney. In so doing, they noted that the existence of a referral relationship between the Plaintiff's attorneys and her treating physicians was relevant and not privileged and was essential to the truth seeking function of the Court system.

Sanctions

Flagg v. Judd, 40 FLWD 2732 (Fla. 2d DCA 12/9/15)

The trial court entered an order striking the Claimant's pleadings and entering a default judgment as a sanction for the Claimant's failure to comply with discovery orders. The Second District reversed and found that it was error to do so because the trial court did not find that the failure to comply was willful and the record did not demonstrate a deliberate disregard for the Court's orders. As such, the case was remanded for an evidentiary hearing to determine whether the failure to obey the discovery orders rose to the level of disobedience which would justify the sanction of striking of pleadings.

Vista St. Lucie Association, Inc. v. Dellatore, 165 So. 3d 731 (Fla. 4th DCA 2015)

The Condominium Association filed a Complaint against Co-Trustees of a trust which owned a unit in its condominium alleging breach of contract and unjust enrichment. The Trustees filed a counterclaim alleging tortious interference with a contract and they served the Association with discovery requests on April 4. On May 10, the Association moved for a 30-day extension of time to respond, admitting that it was already late in doing so. The Trustees moved to compel discovery because the Association had not responded.

Without conducting a hearing, the trial court entered an Order on July 11 compelling the Association to answer the discovery within 30 days of the Order.

On August 15, the Trustees moved to dismiss the Complaint with prejudice due to the Association's failure to comply with the Order compelling discovery. They also requested sanctions against the Association and requested attorney's fees and costs. The Trustees attached an Affidavit of their attorney in support of the motion attesting to the facts, the expenditure of time, the hourly billing rate, and total amount of fees requested.

Without conducting a hearing, the trial court entered an Order of Dismissal with Prejudice and an Order of Attorney's Fees noting that the Association failed to comply with the Orders to produce discovery and also entered an award for attorney's fees. The Association moved for re-hearing arguing that it had faxed the Answers to Interrogatories and Request of Admissions to its counsel on August 5 and the Association's counsel represented this his office inadvertently failed to mail the discovery to the Trustee's counsel while he was on vacation. The Association's counsel took blame for his failure to respond upon his return from vacation. The Association then argued that the Order should be vacated because the trial court failed to conduct the required analysis and ordering sanctions as required by *Kozel v. Ostendorf*.

Almost two years after the Association moved for re-hearing and after retaining new counsel, it moved for a Case Management Conference and requested the conference to allow the parties to coordinate a hearing on the pending motion, attend a mediation conference and set discovery deadlines to resolve the case. The trial court denied the Association's motion stating that "the case was dismissed with prejudice over 18 months ago." The trial court then went on to deny the previously filed Motion for Rehearing and it was from this Order that the Association appealed.

The Fourth District reversed finding that the trial court abused its discretion in dismissing the Complaint with prejudice because it failed to make the requisite findings required by *Kozel v. Ostendorf***.** Further, they reversed the award for attorney's fees because the trial court did not make express findings on the number of hours reasonably expended and the reasonable hourly rate and did not require expert testimony in support of the award.

Chappelle v. South Florida Guardianship Program, Inc., 169 So. 3d 291 (Fla. 4th DCA 2015)

The Fourth District ruled that the trial court abused its discretion in entering a judicial default against Defendants as a sanction against the Defendants and their counsel failing to respond to discovery; failing to appear at a court-ordered mediation; and failing to appear for a calendar call without considering the six factors enumerated in *Kozel v. Ostendorf*, and failing to make explicit findings considering each factor. As they noted, when counsel is involved in conduct to be sanctioned, the *Kozel* analysis is required before entering judicial default and the failure to do so is by itself a basis for remand.

Perkins v. Jacksonville Housing Authority, 175 So. 3d 948 (Fla. 1st DCA 2015)

The trial court dismissed Plaintiff's complaint without prejudice for failing to appear at a Case Management Conference. In doing so, the trial court failed to make findings that the Plaintiff's actions were willful, flagrant, deliberate or otherwise aggravated. As such, the First District reversed.

Jimenez v. Ortega, 179 So. 3d 483 (Fla. 5th DCA 2015)

The District Court held that the trial court erred by failing to dismiss the Plaintiff's claims for pain and suffering and loss of earnings where the Plaintiff, in three separate depositions, gave false or misleading answers to questions concerning the extent, duration, and severity of his pain and suffering and his ability to work. It should be noted that the Plaintiff admitted many of his false statements in his trial.

Setting Aside Default

M.W. v. SPCP Group V, LLC, 163 So. 3d 518 (Fla. 3d DCA 2015)

The minor Plaintiff was injured at an apartment building owned by the Defendant. Before suit was filed, the Plaintiff's attorney wrote the Defendant two letters and demanded the policy limits. He received a letter in reply from the Defendant's attorney. Besides this correspondence, the Plaintiff's attorney and the Defendant's attorney also engaged in a conference by telephone. From these contacts, the Plaintiff's attorney learned that the Defendant was represented by counsel and intended to defend the suit on the merits. In fact, the trial court later found that the Plaintiff's attorney knew the Defendant's attorney was representing the Defendant and no party challenged the trial court's fact finding on this point.

Nevertheless, Plaintiff's counsel found defense counsel to be uncooperative and, due to the lack of cooperation, he did not attempt to contact him again. The Plaintiff then filed a Complaint and served the Defendant and the Defendant failed to answer. The Plaintiff's counsel obtained a Clerk's default without providing notice to the Defendant or its attorney and as the Plaintiff was preparing to try the damage portion of the case, defense attorney called his office to inquire about the status of the case and to ascertain whether the Defendant's insurance carrier was defending the lawsuit.

Plaintiff's counsel then instructed his assistant to "tell [the Defendant's attorney] to contact his insurance company. We don't know what they are doing or not." The Plaintiff then proceeded to try the uncontested damage case to the jury and won a verdict of $1,250,000. When the Defendant learned of the verdict, it moved to vacate the judgment that had been entered based upon lack of notice and the trial court vacated same.

Noting that the trial court's decision to vacate a default can be overturned only upon a showing of a "gross abuse of discretion," the Third District affirmed the trial court. In a special concurrence, Judge Emas questioned whether the notice requirement of Florida Rule of Civil Procedure 1.500(b) is properly triggered by a single pre-suit letter sent five months before the commencement of *an action.*

Statute Of Limitations

Barrier v. JFK Medical Center, Ltd., 169 So. 3d 185 (Fla. 4th DCA 2015)

After her son lapsed into a coma, Ms. Barrier was appointed as his emergency temporary guardian in order to make medical decisions for him and otherwise manage his medical and financial affairs. Before the temporary guardianship expired, the patient was determined to be incompetent and his mother was appointed his plenary guardian. After filing a medical malpractice lawsuit, the Defendants moved for a summary judgment based upon the running of the statute of limitations. The trial court granted the summary judgment and found that, upon Ms. Barrier's appointment as the emergency temporary guardian, she had a duty to investigate a possible medical malpractice claim on her son's behalf.

The Fourth District reversed ruling that the knowledge of the emergency temporary guardian of possible malpractice could not be imputed to the ward for purposes of the running of the statute of limitations until the ward was determined to be incapacitated and until the emergency temporary guardian was appointed the permanent guardian of the ward's property.

Substituted Service Improper

Krisztian v. State Farm Mutual Automobile Insurance Company, 40 FLWD 1689 (Fla. 4th DCA 7/22/15)

The Defendant in a subrogation action appealed a default final judgment and an order denying his Motion to Quash Service of Process arguing that he had not been properly served. In this case, State Farm repeatedly attempted, but failed, to personally serve Krisztian. As a result, they effected substitute service on him by delivering a third pluries Summons and Complaint at a Hollywood address which listed another individual as a co-resident. Return of service stated that this address was the Defendant's usual place of abode.

The Fourth District quashed the trial court finding that the substitute service was not effective where State Farm had failed to demonstrate that the private mail box was the only address discoverable through public records for the Defendant. They further noted that because State Farm was unsuccessful at attempting to serve the Defendant at other addresses, this was insufficient to invoke service under Florida Statute 48.031(6).

Summary Judgment

Panzera v. O'Neal, 40 FLWD 2661 (Fla. 2d DCA 12/2/15)

Following the death of their son, parents brought an action against Publix and the driver of its truck alleging that the Defendants were negligent in causing the accident which killed their son. The trial court granted summary judgment in favor of the Defendants and the Second District affirmed. They noted that the only evidence showed that the driver was traveling below the speed limit in the right lane and that he applied the brakes when he saw the decedent running into the road and that he then steered the truck to the left to avoid the pedestrian.

In response to the motion, the Plaintiffs relied solely on the deposition testimony of the decedent's parents who surmised that the driver could have avoided the accident had he taken additional evasive maneuvers and that he must not have been able to see their son before the collision occurred based upon their personal review of the scene after the accident. The Second District held that the parents were lay witnesses with no experience in accident reconstruction and, therefore, this was inadmissible testimony.

Phillips v. Republic Financial Corp., 157 So. 3d 320 (Fla. 5th DCA 2015)

Phillips was seriously injured when he fell through a painted-over skylight as he started work his company was hired to perform. The skylight that he fell through was painted the same color as the metal panels and when viewed from the roof, the skylight was indistinguishable from the metal panels. Various Defendants moved for Summary Judgment arguing that the painted over condition was a patent defect and therefore there was no duty to warn. In doing so, they relied upon photographs from within the warehouse which were shown after the injury to Phillips' co-worker and he acknowledged that the photos showed that the skylights were visible including the specific skylight that Phillips fell through. The Fifth District reversed finding that there was a factual issue as to whether the defect was a latent defect.

Wilson v. Stone, 172 So. 3d 559 (Fla. 3d DCA 2015)

In a case involving a failure to diagnose a cancerous lesion, the patient's estate alleged that the University of Miami was vicariously liable for the actions of "its agents, apparent agents, servants and/or employees." The only physician specifically identified in the Complaint as associated with the University was Dr. Velez. The University of Miami moved for Final Summary Judgment claiming it was not responsible for the care and treatment provided by Dr. Velez and the Estate filed a response directed only to this issue.

It was not until the hearing on the Motion for Summary Judgment that the Estate, for the first time (the case had been pending for 10 years) argued that the University of Miami may be vicariously liable for the negligence of other physicians. Rather than seeking leave to amend its complaint to include these new allegations, however, the Estate requested that the trial court grant only a Partial

Summary Judgment as to the liability of Dr. Velez. The trial court denied the request and entered Final Summary Judgment.

On appeal, the Estate argued that it was denied due process because it was not given an opportunity to present evidence on the University's vicarious liability for the negligence of other physicians. The Third District found this to be without merit because on a Motion for Summary Judgment, the trial court considers only the issues raised in the pleadings.

Summary Judgment Improperly Shifted Burden to Plaintiff to Prove Causation

Pitcher v. Zappitell, 160 So. 3d 145 (Fla. 4th DCA 2015)

The Defendant law firm represented both the mother and the father as survivors in a wrongful death action following the death of their daughter in a motor vehicle accident. At trial, the father received a total of $200,000 for past and future pain and suffering compared to the award of $4,000,000 for past and future pain and suffering for the mother.

The father then filed a malpractice lawsuit against the law firm alleging that they failed to obtain his informed consent to joint representation. He further alleged that the joint representation compromised the law firm's ability to represent his interests. Further, that the mother made derogatory statements about the father and his relationship with his daughter during a pre-trial deposition and that the law firm neglected to advise the father of the mother's highly inflammatory statement before his own deposition.

He also alleged that the law firm's unwillingness and reluctance to impeach the negative trial testimony of the mother and also failed to properly prepare him for trial. The law firm moved for Summary Judgment and the trial court granting same finding that "the alleged conflict of interest cannot in and of itself form the basis of the legal malpractice lawsuit."

The Court also based its ruling on the element of causation, finding that there was no evidence that the alleged conflict caused the disparate awards. The court found, as a matter of law, that it would require speculation and inference stacking to establish causation.

The Fourth District reversed. They noted that when a Defendant moves for Summary Judgment in a negligence case based on causation, Summary Judgment may not be granted based upon a finding that the Plaintiff has failed to come forward with any evidence of causation because this improperly shifts the burden to the non-movant to establish causation. They also found that it was error to rule that causation would be based on speculation and inference stacking.

Trial Court Improperly Ordered Production of Attorney-Client Privileged Communications

Florida Power & Light Company v. Hicks, 162 So. 3d 1074 (Fla. 4th DCA 2015)

The Plaintiff sued FPL and filed a Request for Production. FPL responded with objections based upon the attorney/client privilege and filed a privilege log. After the Plaintiff filed a Motion to Compel, the Circuit Court required an *in camera* inspection of the documents for which FPL claimed privilege. Following inspection, the trial court ordered production finding that relevance required breaking of the privilege and that the documents contained information that could not reasonably be obtained from another source.

The Fourth District granted certiorari and quashed the order noting that, unlike the work product doctrine, the attorney/client privilege is not defeated by an opponent's showing of relevance and necessity adding that "an order compelling production of attorney/client communications based on relevance and need constitutes a departure from the essential requirements of law."

Venue

King v. Rayborg, 165 So. 3d 764 (Fla. 3d DCA 2015)

Rayborg was injured in a motor vehicle collision in Broward County. Thereafter, he filed an unverified Complaint alleging that King negligently operated a vehicle owned by AKCA which was a foreign corporation authorized to do business in the State of Florida and doing business in Miami-Dade County and/or had an agent or representative in Miami-Dade County. Thereafter, Rayborg filed a First Amended Complaint in which he alleged that King was a resident of Broward County. King was served with a Complaint and he moved to dismiss for improper venue claiming that he was a resident of Polk County where he had been

served with the Complaint and, thus, the action could only be brought in either Polk County where he lived or in Broward County where the accident occurred.

He made no arguments as to where venue would be appropriate with regard to AKCA which had not yet been served with a Complaint, nor did he file any supporting Affidavits. The trial court then heard King's motion before even AKCA had been served. The trial court denied the motion without prejudice noting that the Complaint alleged that the corporate Defendant did business in Miami-Dade County.

That same day, AKA was served with Rayborg's Complaint and it quickly joined in a motion filed by King for reconsideration of the Order denying his venue motion and also asserted its own venue motion. In its motion, AKCA re-asserted King's claim that he was a resident of Polk County. It also alleged that AKCA was an Ohio corporation authorized to do business in Florida with its principle place of business and registered agent in Hillsborough County and that it had no agents, representatives or offices in Miami-Dade County nor any contracts, agreements or relationships with any businesses or independent contractors in Miami-Dade County. It then filed an Affidavit in support of the motion.

AKCA's venue motion was denied even though at the time the motion was considered by the trial court, the record before the trial court was that King resided in either Broward or Polk Counties and that AKCA had no agents or representatives in Miami-Dade County. The Third District reversed the orders on appeal and remanded to the trial court to provide Rayborg with an opportunity to present evidence to rebut AKCA's evidence that it had no agents or representatives in Miami-Dade County so as to be subject to being sued there; to allow the trial court to determine whether King resided in either Broward or Polk County; and to allow the trial court to decide where venue properly lies based upon these determinations.

Hall v. Animals.Com, LLC, 171 So. 3d 216 (Fla. 5th DCA 2015)

The Fifth District reversed the trial court's decision in transferring venue from Lake County to Miami-Dade County on the basis of *forum non conveniens* because the Defendant's Motion to Transfer was based upon the impropriety of Plaintiff's selection of venue and it was only at the hearing on the motion that the Plaintiff learned that the motion was based upon *forum non conveniens.* As such,

the Fifth District stated that it was error for the trial court to entertain the argument without giving the Plaintiff advanced notice.

Work Product Privilege

Millard Mall Services, Inc. v. Bolda, 155 So. 3d 1272 (Fla. 4th DCA 2015)

Plaintiff filed an action for negligence against the owner/operator of amall. In prosecuting her claim, she sent a subpoena duces tecum to the corporate representative of one of the Defendants requesting various documents including incident reports concerning similar acts/occurrences which had occurred at the mall in the three years prior to the fall in question; documents concerning maintenance or cleaning of the subject premises during the month of the fall and documentation concerning maintenance or cleaning of the premises by an out side person/corporation or entity during the year of the fall. The Defendants objected to the production of the documents.

At the hearing, Defendants filed Affidavits stating that the documents included their quarterly safety committee reports, were not discoverable because they included incident reports that contained photographs, discussion surrounding the incidents and mental impressions regarding the incidents that occurred during the relevant time period. After reviewing the documents *in camera*, the trial court ordered production of the quarterly safety committee reports for the three year time period but sustained a privilege objection concerning the incident report generated as a result of this fall.

Defendants then filed for certiorari review of the order asserting that the committee reports were not discoverable pursuant to the work product privilege. The Fourth District upheld this objection and quashed the trial court's order. In doing so, the Fourth District noted that the Plaintiff has been able to use discovery to obtain relevant information about the accident that she was involved in, as well as, similar prior incidents on the property and that the Plaintiff had the ability to obtain substantially equivalent information through discovery directed to the Defendants. The efforts enabled her to obtain a list of incidents on the premises for three years pre-dating the accident including the dates, times, locations and a detailed description of those incidents. Because the Plaintiff has been unable to demonstrate that she was unable to obtain the substantial equivalent of the material by other means, the Defendants objections were sustained.

Judge Warner dissented finding that the documents should not be considered work product because these reports were used to promote safety and to determine whether proper maintenance was being done at the mall and not made in anticipation of litigation. Moreover, she believed that the enactment of the transitory foreign substances statute (Florida Statute §768.055) should make these reports discoverable.

In doing so, she pointed out that the respondent had requested that the mall preserve the video of the incident which could have shown how long the dangerous condition had existed, however, the video was not available. Thus, the Plaintiff must show that "the condition occurred with regularity and was therefore foreseeable." Judge Warner concluded that the quarterly reports could shed light on this issue and therefore should be produced.

Seaboard Marine Limited v. Clark, 174 So. 3d 626 (Fla. 3d DCA 2015)

Plaintiff was an employee of Stevedoring Company who was injured while working at Seaboard's terminal at the Port of Miami. During the loading process of cargo containers on to ships, a top loader operated by another employee of the Stevedoring Company ran over Clark and crushed his legs which were later amputated. Clark then sued Seaboard and the owner of the terminal.

Immediately following the accident, attorneys for Seaboard and other Seaboard representatives took 91 post-accident photographs of the area in which the accident occurred. In addition to these photographs, Seaboard preserved approximately 90 minutes of surveillance footage of the terminal from the night of the accident.

The footage was taken from a camera stationed approximately 100 feet from the location of the accident. The surveillance footage depicts the location of the containers within the terminal, the terminal layout, the top loaders working in the accident area, as well as a somewhat distant view of the accident itself.

The surveillance footage was turned over to Clark's counsel before Clark brought his action against Seaboard and the owner of the terminal. Seaboard declined to provide Clark with the 91 post-accident photographs asserting work product and attorney client privilege.

Following the filing of the lawsuit, Clark sought the photographs to which Seaboard objected. Seaboard filed an appropriate privilege log. Clark then filed a Motion to Compel the production of the photographs whereupon Seaboard responded and provided the trial court with the photographs for an in-camera inspection.

The trial court then entered an Order granting Clark's Motion to Compel finding that the photographs were relevant to the issues in the lawsuit and that Clark had no other means of obtaining the photographs. At the time the motion was heard by the trial court, no witnesses had been deposed nor did Clark present any evidence at the hearing indicating that Clark had attempted to obtain any post-accident photographs taken by either the owner of the terminal or Clark's employer.

The Third District granted certiorari finding that the trial court improperly entered the order compelling the disclosure of the post-accident photographs because the Plaintiff had failed to exercise due diligence to obtain substantially equivalent materials to the privileged documents. The Third District concluded that "no doubt the photographs are relevant; they might be highly probative to the critical issues in the case. Rule 1.280 (b)(4), however, establishes a much higher bar than mere relevancy to obtain such privileged work-product materials developed by an adversary. The party must first diligently exhaust other means of obtaining the substantial equivalent." Because the record was devoid of such diligence, certiorari was granted.

City of Port St. Lucie v. Follano, 177 So. 3d 301 (Fla. 4th DCA 2015)

Follano sued the City for negligence after stepping into an uncovered sewer valve access pipe up to her knee. The City took photographs of the area on the day of the incident after Follano was extracted by the Fire Department. The photographs showed the uncovered pipe, but the City claims that the surrounding area had been altered significantly by the fire fighters. Follano took photographs of the area the next day, but the pipe had been covered by that time.

Once suit was filed, Follano moved to compel production of the City's photograph and the City claimed work product privilege. She argued that the City's photographs were the only available evidence of how the pipe appeared on

the day of the incident. The trial court granted the motion without reviewing the City's photographs simply finding that "the photographs cannot be obtained by any other measure."

The Fourth District granted certiorari finding that the trial court departed from the essential requirements of the law by compelling production of the photographs of the accident scene without conducting an *in-camera* review. As the court explained, an *in-camera* review was necessary to determine whether the photographs provided an evidentiary value which the Plaintiff claims and is also necessary to determine whether substantially equivalent photographs could be obtained without undue hardship.

Work Product Status Continues After Litigation Is Over

Sedgwick Claims Management Services, Inc. v. Feller, 163 So. 3d 1252 (Fla. 5th DCA 5/15/15)

The Fifth District granted certiorari and ruled that the trial court erred by finding the work product privilege to be inapplicable on grounds that the current case between these parties involved issues different than those presented in the prior litigation for which the documents were prepared. In doing so, they noted that it is "well established that 'work product retains its qualified immunity after the original litigation terminates, regardless of whether or not the subsequent litigation is related.'"

The District Court also held that the trial court erred by finding the attorney/client privilege inapplicable without ever reviewing the documents in question. In doing so, they ruled that the trial court erred by finding that the attorney/client privilege was waived by counsel's statement at a hearing that he did not anticipate objecting to the discovery requests because the client is the holder of the privilege and the client timely objected to the request. Lastly, the District Court found that the trial court erred by finding that the privilege was waived by counsel's filing of a privilege log which the trial court viewed as insufficient due to its lack of detail. The log was not produced in response to a trial court order and could have been amended to cure any defects had counsel been given that opportunity.