Procedural and Legal Issues

Affidavits

McNabb v. Bay Village Club Condominium Association, Inc., 216 So. 3d 688 (Fla. 2d DCA 2017)

The trial court granted Summary Judgment in favor of a Condominium Association in a slip and fall case determining, as a matter of law, that the Association did not have notice of an oil leak that allegedly caused the accident. In opposition to the Motion for Summary Judgment, the Plaintiff presented the Affidavit of a professional engineer who estimated the depth of the oil in the area and concluded that the oil had been leaking for approximately 18 days. The expert also opined that, even if the depth of the oil had been less, it would still have been leaking for at least 4 ½ days. The trial court discounted the expert's Affidavit finding that it both lacked credibility and left open other possibilities for why the fall occurred. The Second District reversed finding that the trial Judge erroneously weighed the credibility and reliability of the expert. At the same time, they recognized that trial Judges are not required to consider Affidavits that are not based upon personal knowledge or are devoid of evidentiary support; however, in this case, they found that the expert's Affidavit was based on personal knowledge and gleaned from analysis of record documents.

Appeals

Mid-Continent Casualty Company v. Flora-Tech Plantscapes, Inc. 225 So. 3d 336 (Fla. 3d DCA 2017)

An Order granting a Motion for Summary Judgment which declares that an insurance company has a duty to defend claims against the insured is a non-final non-appealable order where the order merely grants summary judgement but does not enter judgment.

Attorney/Client privilege

Worley v. Central Florida Young Men's Christian Association, Inc., 228 So. 3d 18 (Fla. 2017)

The Supreme Court held that the attorney/client privilege protects a party from being required to disclose that his or her attorney referred the party to a physician for treatment. In doing so, the Supreme Court distinguished the *Boecher*

decision noting that *Boecher* involved disclosure of financial information of a retained expert as opposed to a treating physician.

Attorney's fees

Hovercraft of South Florida, LLC v. Reynolds, 211 So. 3d 1073 (Fla. 5th DCA 2017)

The Fifth District held that it was error for the trial court to award attorney's fees where the prevailing parties failed to file their Motion for Attorney's Fees within thirty days after the final judgment in which it was stated that the court had reserved jurisdiction to determine attorney's fees and costs. The court also held that it was error to grant the motion for fees on the alternative theory of excusable neglect.

Peterson v. Hecht Consulting Corp., 226 So. 3d 999 (Fla. 4th DCA 2017)

The Fourth District affirmed the trial court's finding that the Defendants were entitled to an award of attorney's fees; however, it also found that the trial court failed to properly reduce the lodestar amount awarded based upon the results obtained which revealed only limited success in the underlying litigation.

Sciandra v. PennyMac Corp., 227 So. 3d 164 (Fla. 2d DCA 2017)

The Second District held that it was error to award attorney's fees to the Plaintiff in absence of expert testimony as to the reasonableness of the hourly rate and the hours expended.

Joyce v. Federated National Insurance Company, 228 So. 3d 1122 (Fla. 2017)

The Supreme Court quashed a decision of the Fifth District that reversed the trial court's award of a contingency fee multiplier. The Supreme Court held that the application of a contingency fee multiplier to an award of attorney's fees to a prevailing party is not limited to "rare" and "exceptional" circumstances. They further held that the trial court properly applied a 2.0 contingency fee multiplier to an award of attorney's fees to insureds that prevailed in an action against its insurance company upon a finding that the relevant market required a contingency fee multiplier for the insureds to be able to obtain competent counsel; the insured's attorney could not have mitigated the risk of non-payment; the case was a complex commercial case; and the likelihood of success at the outset was even at best.

Forthuber v. First Liberty Insurance Corporation, 229 So. 3d 896 (Fla. 5th DCA 2017)

Insured filed suit against the insurance company and prevailed. As such, the Fifth District held that where the attorney representing the insured had worked at a law firm that originated the claim and then continued to represent the insured after leaving that firm, it was error for the trial court to refuse to consider hours expended by the attorney while working at the prior firm in calculating the attorney's fee award. The Fifth District also held that the trial court erred in limiting pre-judgment interest by only including the interest accrued through the evidentiary fee hearing rather than the date the final judgment was entered.

Westaway v. Wells Fargo Bank, N.A., 230 So. 3d 505 (Fla. 2d DCA 2017)

The Second District ruled that the trial court abused its discretion in reducing the reasonably hourly rate to a rate below that established by expert evidence where it was apparent that the Judge did so based upon her personal opinion of what attorneys should charge based on their number of years in practice. In so doing, the Second District noted that while the trial court was not bound by the expert's opinion, here the Judge did not indicate that her determination of a reasonable hourly rate was rooted in her experience as a lawyer, nor did she explain why the varying rates that she applied were more reasonable than the single rate that the Plaintiff's attorneys proposed. Because the court's apparent justification for reducing the hourly rate was her personal opinion of what attorneys should charge based upon their number of years in practice, the Second District concluded that "this alone does not constitute competent, substantial evidence."

TRG Columbus Development Venture, Ltd., v. Sifontes, 230 So. 3d 541 (Fla. 3d DCA 2017)

The Appellate Court affirmed the trial court's award of attorney's fees including a contingency fee multiplier for trial court services. Thereafter, the Appellate Court granted a Motion for Appellate Attorney's Fees and it remanded the matter to the trial court for a determination of the amount of the appellate fees. The trial court found that it was not bound by the law of the case to award a multiplier when determining the amount of the appellate fees.

Florida Farm Bureau Casualty Insurance Company v. Gray, 232 So. 3d 478 (Fla. 1st DCA 2017)

The insured prevailed in a declaratory judgment action brought by the insurance company. The attorney's fee agreement entered into between the insured and their attorneys provided that the attorney would be paid a normal hourly rate whether the case was won or lost. In the fee agreement, they noted that they may record higher hourly charges and in the event the court were to award legal fees and costs, any higher amount awarded by the court including multipliers with the amount of the legal fees. In awarding attorneys fees to the insured, the First District found that the trial court erred in applying a contingency risk multiplier because the fee agreement between the insured and his attorney was not a contingency fee agreement nor was it a partial contingency fee contract.

Certiorari

Hernando HMA, LLC v. Erwin, 208 So. 3d 848 (Fla. 5th DCA 2017)

In a 2-1 decision, the Fifth District denied certiorari after the trial court granted the Plaintiff's Motion to Amend to Add a Claim for Punitive Damages. The hospital argued that certiorari was proper because the trial court erroneously relied upon a Supreme Court case which was based upon a prior version of the punitive damages statute, rather than the amended statute which heightened the burden of proving an employer's fault from ordinary negligence to gross negligence. The majority denied the petition finding that the Defendants failed to properly raise this issue before the trial court.

Laycock v. TMS Logistics, Inc., 209 So. 3d 627 (Fla. 1st DCA 2017)

Following a verdict in favor of the Plaintiff, a juror contacted the court and spoke to the Judge's assistant. The Defendant announced that one of its attorneys had also spoken to jurors. According to an Affidavit that attorney later submitted, two jurors approached her as she left the courthouse. They offered opinions on the case generally, along with specific details on jury deliberations and one juror "kept repeating that jurors agreed not to follow the court's instructions."

Over the Plaintiff's objection, the trial court ordered a limited interview of one juror. The Plaintiff filed no certiorari petition to stop it and the interview went forward. After that, the trial court considered the Defendant's Motion to Interview Additional Jurors and the court ultimately concluded that the Defendant

"established by sworn factual allegations and the testimony of [the juror already interviewed] a *prima facie* case of juror misconduct." The court continued and stated that the misconduct would require a new trial if found to be true unless the Plaintiff could "demonstrate there is no reasonable possibility that the juror misconduct affected the verdict."

As such, the trial court ordered that it would contact the remaining five jurors and schedule the interviews. The Plaintiff then sought certiorari review and the First District denied same stating that the Plaintiff could not demonstrate irreparable harm that could not be remedied on appeal. Specifically, continuation of litigation does not constitute irreparable harm nor is the claim that there would be injury to the jurors or the sanctity of their process likewise does not constitute irreparable harm. The court added that "if the interviews go forward and lead to an order granting a new trial, then [Plaintiff] can appeal that order."

Varnedore v. Copeland, 210 So. 3d 741 (Fla. 5th DCA 2017)

In this medical malpractice action, the Plaintiff moved to amend his Complaint to assert claims for punitive damages, but did not attach a copy of the proposed Amended Complaint to his motion. The Defendants objected to the lack of the proposed Complaint. The Plaintiff also served an evidentiary proffer in advance of the hearing, but also made additional, oral, evidentiary proffers during the hearing over the Defendant's objections. At the conclusion of a lengthy hearing, the trial court granted Plaintiff's Motion to Amend as to certain Defendants and denied it as to others. The trial court did not provide a basis for its rulings in its oral pronouncement or in its later written order.

The Fifth District granted certiorari and quashed the trial court's order finding that it departed from the essential requirements of law by granting the Motion to Amend to add a claim for punitive damages where the Plaintiff did not attach a copy of the proposed amendment to the motion. The District Court also found that the trial court departed from the essential requirements of law in overruling the Defendant's objections and permitting the Plaintiff to make inappropriate oral proffers. Lastly, it ruled that when a Motion to Amend to add punitive damages is granted, the trial court is required to make an affirmative finding that the Plaintiff has made a reasonable showing by evidence which would provide a reasonable evidentiary basis for recovering punitive damages.

Howmedica Osteonics Corp. v. Trowridge, 211 So. 3d 114 (Fla. 4th DCA 2017)

In this case, the Plaintiffs allege they sustained personal injuries from hip-implant medical devices manufactured by the Defendant that were subsequently recalled. The Fourth District granted certiorari and ruled that the trial court improperly denied the Defendant's request to redact identifying information from reports of adverse incidents along with related documents of healthcare providers who reported "foreign adverse events" associated with the medical device. In doing so, they noted that the federal law, which requires redaction of identifying information of voluntary reporters of adverse events involving the medical devices does not distinguish between foreign and domestic voluntary reporters.

Josifov v. Kamal-Hashmat, 217 So. 3d 1085 (Fla. 3d DCA 2017)

In an action against a hotel for the death of a patron who drowned in the hotel's swimming pool, the Third District granted certiorari and held that the trial court departed from the essential requirements of law in compelling disclosure of non-party identification information and surveys completed by guests at the hotel. The Third District held that the names and contact information of non-party hotel guests who completed the survey were constitutionally protected private details.

Akhnoukh v. Benvenuto, 219 So. 3d 96 (Fla. 2d DCA 2017)

The Second District granted certiorari and held that the trial court departed from the essential requirements of law by granting the Plaintiff's Motion for Protective Order prohibiting the deposition of her minor son who was 8-years old at the time of the accident and who was 11 at the time of the scheduled deposition. The minor son was sitting in the front seat at the time of the accident and the Second District found that he was a material witness as to the circumstances in the vehicle at the time of impact and to the Plaintiff's day to day activities and how the accident affected the Plaintiff.

Knauf Plasterboard Company, Ltd. v. Ziegler, 219 So. 3d 882 (Fla. 4th DCA 2017)

Knauf was sued in a prior unrelated case. In that case, the jury awarded punitive damages. They subsequently entered into a post-judgment settlement and recorded a satisfaction of judgment. In this case, the Defendant sought to avoid a punitive damages claim based upon Florida Statute 768.73(2) which prohibits a subsequent punitive damage award if punitive damages were previously awarded in another action. The trial court entered an order permitting the Plaintiff to conduct discovery on the amount actually paid in punitive damages from the prior

settlement. The Fourth District granted certiorari finding that the trial court departed from the essential requirements of the law by construing the statute as permitting discovery of the amount of punitive damages the Defendants actually paid in a post-judgment settlement.

Smart v. Bock, 220 So. 3d 1196 (Fla. 4th DCA 2017)

The Fourth District granted certiorari finding that an order granting an IME in an employment discrimination action departed from the essential requirements of law where the order failed to specify the time, place, manner, conditions and scope of examination and the person or persons by whom the examination was to be made.

Paylan v. Fitzgerald, 223 So. 3d 431 (Fla. 2d DCA 2017)

A physician sued her lawyers for malpractice after their representation of her in a criminal action. In the malpractice suit, the trial court ordered the physician to disclose a patient's confidential medical records without written authorization from the patient or a subpoena with notice to the patient. As such, the Second District granted certiorari.

Tracey v. Swanholm Central, LLC, 223 So. 3d 448 (Fla. 2d DCA 2017)

The Personal Representative filed two law suits. In the first one, it was alleged that the decedent suffered significant injuries when a malfunctioning automatic sliding door to a Walgreens store hit her and knocked her to the ground. The Plaintiff alleged that as a result of the injury sustained in the incident, she died. A second action alleged that, while recuperating at a Senior Living Community following the Walgreens' accident, she sustained aggravated injuries as a result of inadequate care including another fall. After the second fall, she was transported to a hospital where she died three days later.

Following the filing of the two lawsuits, the Personal Representative moved to consolidate the two actions and argued that consolidation would prevent a substantial risk of inconsistent verdicts because a jury in the Walgreens' trial could find that the second accident caused all the damage whereas a jury in the senior living community case could find that the first accident caused all the damages. The trial court denied the Motion to Consolidate and the Second District granted certiorari finding that the denial of the Motion to Consolidate could result in repugnant and inconsistent verdicts thus resulting in material injury that could not be remedied on appeal.

GEICO General Insurance Company v. Nocella, 224 So. 3d 870 (Fla. 2d DCA 2017)

Nocella was involved in an automobile accident with Franklin who was insured by GEICO. Nocella prevailed in a negligence action against Franklin and a final judgment was entered against her. 32 days after entry of the final damage judgment, Nocella moved to join GEICO as a party Defendant pursuant to Florida Statute §627.4136(4). Following a hearing, the trial court granted the motion. GEICO filed certiorari and the Second District granted same finding that irreparable harm had resulted where the Motion to Join was filed more than 15 days after the judgment had become final.

Choi v. Auto-Owners Insurance Company, 224 So. 3d 882 (Fla. 2d DCA 2017)

Choi was a passenger in a car that was struck by Beutler's vehicle. Choi was seriously injured and Beutler was under insured. Choi filed suit seeking recovery from Beutler for injuries she suffered in the accident under a negligence theory. In Count II, Choi sought uninsured motorist benefits from Auto-Owners for damages she suffered in excess of the amount covered by Beutler's insurance policy. In Count III, Choi sought punitive damages against Beutler based upon a claim that Beutler was intoxicated to the extent her faculties were impaired at the time of the accident. Auto-Owners filed a Motion to Sever the uninsured motorist claim against it from the claims against Beutler in Counts I and III and contended that the non-joinder statute required separate trials of Choi's claims against the tortfeasor and the UM carrier. Following the granting of the motion, Choi sought certiorari review from the Second District. The Second District found that the trial court departed from the essential requirements of law by granting the Motion to Sever because the claims against the UM carrier and the alleged tortfeasor were "inextricably interwoven." Because of the risk of inconsistent outcomes and material injury that could not be corrected on post-judgment appeal, certiorari was appropriate.

Regalado v. Vila, 225 So. 3d 874 (Fla. 3d DCA 2017)

The Plaintiffs were injured while dining at a sidewalk café when a vehicle crashed into them. Before the accident, the café had twice been cited by the City of Miami's Code Enforcement Board for operating an illegal sidewalk café. The trial court ordered that the Plaintiff could take the depositions of the Mayor and the City Manager in an effort to determine why the sidewalk café was permitted to continue operating after receiving citations from the Code Enforcement Board. The City took certiorari and the Third District denied same.

Leinberger v. Magee, 226 So. 3d 899 (Fla. 4th DCA 2017)

The Fourth District granted certiorari finding that the trial court failed to properly comply with Florida Statute §768.72(1). In doing so, the Fourth District noted that the moving party seeking an award of punitive damages must attach a proposed amended pleading to the motion seeking leave to amend. Further, the proffer or other evidence in the record to support the punitive damage claim must be served prior to the hearing on the Motion for Leave to Amend and must be served at least 20 days before the hearing. Third, the trial court must make an affirmative finding that the Plaintiff made a reasonable showing by evidence which would provide a reasonable evidentiary basis for recovering such damages if the Motion to Amend was granted.

Walgreen Company v. Rubin, 229 So. 3d 418 (Fla. 3d DCA 2017)

In a consolidated certiorari proceeding, the Third District declined to grant certiorari and upheld the trial court's order requiring Walgreen and CVS to bear the cost of reviewing and redacting financial and health information from the personnel files of the pharmacists who had dispensed prescriptions to the Plaintiff. Walgreens submitted an unsworn statement of its paralegal advising of the number of hours it would take to pull and prepare its files. CVS did not provide a cost estimate or any other information regarding the time needed to compile the responsive documents.

In denying the petition for certiorari, the Third District noted that the trial court correctly disregarded the unsworn statement from Walgreen's paralegal noting that an unsworn statement does not constitute evidence. Further, even if it did constitute evidence, the records still failed to establish that the Defendants suffered irreparable harm. The court also noted in footnote 3 that the pharmacy's arguments that they would be unable to recover document production costs under the Statewide Uniform Guidelines for Taxation on Costs and Civil Action even if they prevailed in trial against the Plaintiff. The Third District noted that the guidelines are advisory and that the Petitioners had not cited any cases holding that the guidelines would preclude recovery. Implicit in this statement is that costs may be recovered under the guidelines unless the type of cost is specifically prohibited from being awarded.

Fetlar, LLC v. Suarez, 230 So. 3d 97 (Fla. 3d DCA 2017)

The Third District granted certiorari and held that the trial court improperly granted Plaintiffs' Motion to Amend its Complaint to add a claim for punitive damages because it did not attach a proposed Amended Complaint to the motion and failed to make a proffer required to assert punitive damage claims against the corporate Defendants.

PP Transition, LP v. Munson, 232 So. 3d 515 (2d DCA 2017)

The Plaintiff filed a medical malpractice action claiming damages as a result of the care that Munson received from the nursing staff at the hospital. During presuit, the Plaintiff submitted an Affidavit from a California-licensed neurologist who expressed opinions on the nursing standard of care in Florida. Following presuit, the Defendant filed a Motion to Dismiss for failure to plead a claim or for an evidentiary hearing on the Plaintiffs' compliance with the presuit screening statute arguing, amongst other things, that the California-based witness was ineligible to offer opinions on the standard of care applicable to nurses in Florida. See §766.206(1), (2). After a non-evidentiary hearing, the trial court denied the motion and gave no explanation for its ruling either on the record or in the subsequent written order denying the motion.

The Defendant filed certiorari and the Second District granted same noting that the trial court failure to make findings as to the Plaintiffs' compliance with Chapter 766 resulted in a denial of the procedural safeguards of the Chapter for which certiorari relief was appropriate.

Consolidation of actions

Tracey v. Swanholm Central, LLC, 223 So. 3d 448 (Fla. 2d DCA 2017)

The Personal Representative filed two law suits. In the first one, it was alleged that the decedent suffered significant injuries when a malfunctioning automatic sliding door to a Walgreens store hit her and knocked her to the ground. The Plaintiff alleged that as a result of the injury sustained in the incident, she died. A second action alleged that, while recuperating at a Senior Living Community following the Walgreens' accident, she sustained aggravated injuries as a result of inadequate care including another fall. After the second fall, she was transported to a hospital where she died three days later.

Following the filing of the two lawsuits, the Personal Representative moved to consolidate the two actions and argued that consolidation would prevent a

substantial risk of inconsistent verdicts because a jury in the Walgreens' trial could find that the second accident caused all the damage whereas a jury in the senior living community case could find that the first accident caused all the damages. The trial court denied the Motion to Consolidate and the Second District granted certiorari finding that the denial of the Motion to Consolidate could result in repugnant and inconsistent verdicts thus resulting in material injury that could not be remedied on appeal.

Costs

Walgreen Company v. Rubin, 229 So. 3d 418 (Fla. 3d DCA 2017)

In a consolidated certiorari proceeding, the Third District declined to grant certiorari and upheld the trial court's order requiring Walgreen and CVS to bear the cost of reviewing and redacting financial and health information from the personnel files of the pharmacists who had dispensed prescriptions to the Plaintiff. Walgreens submitted an unsworn statement of its paralegal advising of the number of hours it would take to pull and prepare its files. CVS did not provide a cost estimate or any other information regarding the time needed to compile the responsive documents.

In denying the petition for certiorari, the Third District noted that the trial court correctly disregarded the unsworn statement from Walgreen's paralegal noting that an unsworn statement does not constitute evidence. Further, even if it did constitute evidence, the records still failed to establish that the Defendants suffered irreparable harm. The court also noted in footnote 3 that the pharmacy's arguments that they would be unable to recover document production costs under the Statewide Uniform Guidelines for Taxation on Costs and Civil Action even if they prevailed in trial against the Plaintiff. The Third District noted that the guidelines are advisory and that the Petitioners had not cited any cases holding that the guidelines would preclude recovery. Implicit in this statement is that costs may be recovered under the guidelines unless the type of cost is specifically prohibited from being awarded.

Depositions

Akhnoukh v. Benvenuto, 219 So. 3d 96 (Fla. 2d DCA 2017)

The Second District granted certiorari and held that the trial court departed from the essential requirements of law by granting the Plaintiff's Motion for Protective Order prohibiting the deposition of her minor son who was 8-years old at the time of the accident and who was 11 at the time of the scheduled deposition. The minor son was sitting in the front seat at the time of the accident and the Second District found that he was a material witness as to the circumstances in the vehicle at the time of impact and to the Plaintiff's day to day activities and how the accident affected the Plaintiff.

Regalado v. Vila, 225 So. 3d 874 (Fla. 3d DCA 2017)

The Plaintiffs were injured while dining at a sidewalk café when a vehicle crashed into them. Before the accident, the café had twice been cited by the City of Miami's Code Enforcement Board for operating an illegal sidewalk café. The trial court ordered that the Plaintiff could take the depositions of the Mayor and the City Manager in an effort to determine why the sidewalk café was permitted to continue operating after receiving citations from the Code Enforcement Board. The City took certiorari and the Third District denied same.

Equitable subrogation

Holmes Regional Medical Center v. Allstate Insurance Company, 225 So. 3d 780 (Fla. 2017)

Hintz sustained head injuries when his scooter collided with an automobile driven by an individual insured by Allstate. Hintz received medical treatment at Holmes Regional Medical Center where according to Allstate, his injuries were "exacerbated by medical negligence." Hintz filed suit against the operator and owner of the vehicle. The Plaintiff successfully argued that the Defendants could not present evidence that medical negligence was a contributing cause of the Plaintiff's injuries. The jury found the Defendants liable for the Plaintiff's injuries and a judgment in excess of $11,000,000 was entered. Thereafter, Allstate paid $1,100,000 which was its policy limit and the Defendants had not paid the remainder of this judgment.

Following the verdict, the Plaintiff filed a separate medical malpractice lawsuit against Holmes Regional Medical Center. Allstate and its insureds were granted leave to intervene in the lawsuit and both parties filed complaints claiming

they were entitled to equitable subrogation from the medical providers. In response, the medical providers sought dismissal of the complaint because neither Allstate nor its insured had paid the Plaintiff's damages in full. The trial court agreed and dismissed that action. The Supreme Court upheld the trial court's decision and held that a party that has had judgement entered against it was not entitled to seek equitable subrogation from a subsequent tortfeasor when the judgment had not been fully satisfied.

Evidence Code amendments

In Re: Amendments to the Florida Evidence Code, 210 So. 3d 1231 (Fla. 2/16/17)

The Florida Supreme Court declined to adopt the legislative changes to Florida Statutes 90.702 and 90.704 of the Evidence Code made by the "*Daubert* Amendment" which changed the standard of admissibility for scientific expert evidence from the *Frye* standard to *Daubert* and the standard found in the Federal Rule of Evidence 702, to the extent that the Amendments are procedural. The court ruled, however, that constitutional concerns raised by this Amendment must be left for a proper case or controversy. The court also declined to adopt the changes to Florida Statute 766.102 which required a standard of care expert witness in a medical malpractice action to specialize in the same specialty, rather than the same or similar specialty as the healthcare provider against whom or on whose behalf the testimony is offered. Again, the court ruled that this only applied to the extent that the Amendments were procedural and left open the possibility that a subsequent challenge could result in a different outcome.

Forum non conveniens

Magdalena v. Toyota Motor Corp., 42 FLWD 2513 (Fla. 3d DCA 11/29/17)

The trial court granted a dismissal based upon *forum non conveniens*. Thereafter, the trial court entered a cost award and a final judgment in favor of the Defendant based upon the granting of the dismissal. The Third District reversed and held that dismissal on the basis of *forum non conveniens* was not a judgment or ruling on the merits but rather, was a ruling merely providing that another forum was more convenient and would best serve the ends of justice. As such, the Defendant was not entitled to an award of fees or costs.

Fraud on the Court

Bryant v. Mezo, 226 So. 3d 254 (Fla. 4th DCA 2017)

The Plaintiff filed suit after a minor automobile accident. She alleged that she suffered neck and back injuries. The Plaintiff was not transported from the scene and was able to return to work the following day. She did not begin receiving chiropractic treatment for her neck and back until two weeks after the accident and; a few months later, she had neck surgery. In response to Interrogatories, the Plaintiff identified a prior Worker's Compensation claim in which she injured her left arm. She did not include any information about neck or back injuries. During her deposition, the Plaintiff also failed to mention any neck or back injuries and stated that she only had two prior injuries; an ankle and a left arm injury.

Records from the State of Florida, Division of Worker's Compensation revealed that the Plaintiff had filed 2 claims in which she complained of a cervical spine injury. The records contained the deposition from her former chiropractor who testified that he treated her for a neck injury 2-3 times a week for nine months. Notably, she treated more than 70 times for that injury and during the course of the proceedings, complained of "rather significant neck pain." She was eventually assigned a 7% impairment of her whole body related to her cervical spine. Records from a hospital revealed treatment for back injuries in two other years and there was also evidence of further chiropractic treatment in yet another year. The trial court dismissed Plaintiff's complaint for fraud on the court and the Fourth District affirmed.

Obregon v. Rosana Corp., 232 So. 3d 1100 (Fla. 3d DCA 2017)

The Plaintiff sued Uncle Tom's for injuries to her neck, back, right leg, right shoulder, and right arm as a result of a slip and fall. Although the Plaintiff revealed some of the medical providers who had treated her prior to this slip and fall, she failed to disclose numerous healthcare providers who had treated her for injuries and pain directly related to the injuries she was seeking damages for.

During her deposition, Uncle Tom's learned that Obregon had medical insurance through Medica Healthcare which was a fact not previously disclosed by her in responses to collateral source interrogatories. Uncle Tom's also learned that Obregon had received treatment at a local hospital and with two other healthcare providers. These healthcare providers had been omitted from her answers to interrogatories.

As a result of subpoenaing the records from these healthcare providers, Uncle Tom's uncovered 16 additional treating facilities and healthcare providers that had not been disclosed by her in her answers to interrogatories or during her deposition. The Plaintiff also denied that she had been diagnosed with a herniated disc and the records subpoenaed revealed that she had been diagnosed with this at least three years prior to the slip and fall. The Plaintiff also denied being involved in any motor vehicle accidents within four years of the slip and fall; however, subpoenaed records reflect that she had been involved in an accident the year before the slip and fall and had filed a PIP claim for injuries to her back, neck and left shoulder as a result of that accident.

Moreover, she was treated 41 times by healthcare providers as a result of that accident and this had never been disclosed in answers to written discovery or during her deposition. Uncle Tom's also learned that the Plaintiff was receiving Social Security Disability benefits and they then subpoenaed the non-privileged records of the attorney who represented her in conjunction with her disability claim and in doing so discovered nine more physicians and facilities that had treated her which had also not been disclosed. The trial court dismissed the claim for fraud on the court and the Third District affirmed same.

Willie-Koonce v. Miami Sunshine Transfer & Tours Corp., 233 So. 3d 1271 (Fla. 3d DCA 2017)

The Plaintiff was injured as she was removing her luggage from a trailer pulled by a Miami Sunshine vehicle. The vehicle and trailer began backing up and ran over her pinning her under the axle of the trailer. The Plaintiff sustained serious injuries including a 10-day hospital stay for treatment of her fractured femur. The treatment included implanting a titanium rod and several screws to repair the bone followed by extensive physical therapy to regain much of her pre-injury mobility. During pre-trial discovery, the Plaintiff provided sworn answers to Interrogatories and deposition testimony that included statements that she had a "permanent limp;" she needed a cane to get around; and that when she walks a "few steps" to her car without a cane, she limps. She also testified that she could not walk without a cane carrying large boxes; had not tried carrying heavy or bulky items; and had to use a hand rail to walk up steps without a cane.

Unbeknownst to her, the Plaintiff had been surveilled. Surveillance clearly showed her walking continuously up and down steps without using a cane or hand rail, carrying large bulky items (of indeterminate weight) without assistance, up and down steps without using a cane or a hand rail. It also showed her walking to the back of her car, opening her trunk, and carrying packages (again, without the

assistance of another person) into her home without using the cane or limping. The Defendant moved to dismiss the case for fraud on the court and the trial court granted same. The Third District upheld the dismissal finding that there was clear and convincing evidence of an intention to deceive the court.

IME

Smart v. Bock, 220 So. 3d 1196 (Fla. 4th DCA 2017)

The Fourth District granted certiorari finding that an order granting an IME in an employment discrimination action departed from the essential requirements of law where the order failed to specify the time, place, manner, conditions and scope of examination and the person or persons by whom the examination was to be made.

Incident report

Ruby Tuesday, Inc. v. Metalonis, 225 So. 3d 397 (Fla. 5th DCA 2017)

The trial court entered an order compelling the production of an incident report prepared after a patron was injured when a chair collapsed at the restaurant. In this case, the reporter testified that she made the report in accordance with company policy to report incidents of injury to patrons. Although the reporter did not personally foresee the potential claim and did not know the purpose for the company policy, this did not negate a finding that the report was work product. The Fifth District concluded that the alleged injury was caused by an object in the restaurant's control and there was some evidence to suggest that the restaurant had prior knowledge of the defective condition of the chair. Under these circumstances, it was foreseeable that the event might form the basis for a claim and the District Court held that the incident report was, therefore, protected work product.

Litigation privilege

Debrincat v. Fischer, 217 So. 3d 68 (Fla. 2017)

The Supreme Court held that the litigation privilege does not bar the filing of a claim for malicious prosecution based upon adding a party Defendant to a civil lawsuit.

Loss of Consortium

Kelly v. Georgia-Pacific, LLC, 211 So. 3d 340 (Fla. 4th DCA 2017)

The Fourth District held that a spouse who was not married to a decedent at the time of the decedent's injury may not recover consortium damages as part of a wrongful death suit. In this case, the decedent worked in construction and was exposed to asbestos from 1973 to 1974. The decedent and his wife did not marry until 1976. In 2014, the decedent was diagnosed with mesothelioma and alleged that the exposure to asbestos caused the disease. He ultimately died from the mesothelioma in 2015.

Medicaid lien

Willoughby v. Agency for Healthcare Administration, 212 So. 3d 516 (Fla. 2d DCA 2017)

Willoughby suffered serious injuries in a motor vehicle accident. Medicaid paid almost $150,000 for medical expenses incurred. After the accident, he sought uninsured motorist benefits from his carrier and they denied coverage and refused to pay him. Willoughby then sued the insurance company for bad faith and unfair claim settlement practices and eventually they settled; paying the Plaintiff $4,000,000. He also received $20,000 from another insurance company for bodily injury and uninsured motorist benefits under the driver's insurance policy. Willoughby and AHCA stipulated that the full value of his personal injury claim was at least $10,000,000. They also stipulated that the Plaintiff suffered at least $23,800 in lost wages and the loss of future earning capacity was valued between $800,000 and $2,000,000. They also agreed that his past medical expenses paid by Medicaid were almost $148,000 and that his future medical expenses would exceed $5,000,000. Finally, they stipulated that his past non-economic damages exceeded $1,000,000 and the parties stipulated that, under the settlement with the uninsured motorist carrier, Willoughby recovered less than $148,000 as payment for his past medical expenses.

Willoughby argued that the Administrative Law Judge improperly included the bad faith portion of the $4,000,000 settlement obtained from his uninsured motorist carrier as being available to satisfy the lien. They also argued that AHCA was only entitled to recover the Medicaid lien from that portion of settlement funds allocated to past medical expenses, whereas AHCA argued that they were entitled to make a claim against past and future medical expenses. The Second District ruled that the Administrative Law Judge could properly order recovery from the

bad faith damages. At the same time, they found that AHCA was only entitled to recover that portion of the settlement allocated to past medical expenses and then remanded for further calculations of the lien.

Motion to Dismiss

Preudhomme v. Bailey, 211 So. 3d 127 (Fla. 4th DCA 2017)

The Fourth District reversed the trial court's dismissal of a Complaint with prejudice after motions to dismiss were granted with no opportunity to amend the Complaint. The reversal occurred despite the absence of any transcript of the hearing on the motion to dismiss. As the Fourth District noted, there was no theory or principle of law in the record which would support dismissal with prejudice.

No more amendments

Dow v. Fidelity Investments, 226 So. 3d 1010 (Fla. 4th DCA 2017)

The Fourth District upheld the trial court's dismissal of a complaint with prejudice. In doing so, it held that the dismissal with prejudice was proper because the Plaintiff's Fifth Amended Complaint failed to state a cause of action and the court concluded that giving the Plaintiff another opportunity to amend the complaint would be futile.

Production of a non-party's confidential records

Paylan v. Fitzgerald, 223 So. 3d 431 (Fla. 2d DCA 2017)

A physician sued her lawyers for malpractice after their representation of her in a criminal action. In the malpractice suit, the trial court ordered the physician to disclose a patient's confidential medical records without written authorization from the patient or a subpoena with notice to the patient. As such, the Second District granted certiorari.

Proposal for Settlement

Atlantic Civil, Inc. v. Swift, 42 FLWD 516 (Fla. 3d DCA 3/1/17)

Because the Third District found that the complete language of a Proposal for Settlement and attached General Release form to be signed by the Defendants did not require that both Defendants agree in order to effectuate the settlement, the Third District reversed the trial court and found that the Plaintiff was entitled to attorney's fees pursuant to the Proposal for Settlement.

Kiefer v. Sunset Beach Investments, 207 So. 3d 1008 (Fla. 4th DCA 2017)

The Fourth District determined that the trial court erred in denying attorney's fees on the grounds that the Proposal for Settlement was ambiguous where the trial court's finding was based upon two paragraphs in the middle of a Release attached to the Proposal. Specifically, the District Court noted that all paragraphs of the Proposal for Settlement clearly related solely to Plaintiff's claims against the one Defendant who was proposing to settle the claim, all but two paragraphs of the attached release indicated that the Release and related to the Plaintiff and this one Defendant and not the other Co-Defendants. Thus, they ruled that the two paragraphs in the middle of the Release that did not include the Defendant's name did not render the Proposal ambiguous and unenforceable.

Costco Wholesale Corp. v. Llanio-Gonzalez, 213 So. 3d 944 (Fla. 4th DCA 2017)

Following a summary judgment entered in favor of the Defendant, Costco moved for its attorney's fees pursuant to an expired Proposal for Settlement. The trial court denied the Motion for Attorney's Fees and the Fourth District reversed and found that the trial court erred in finding that the Proposal for Settlement was ambiguous and unenforceable because the release attached to the proposal contained broad language releasing individuals or entities in addition to the Defendant and releasing claims or potential claims more than and broader than the claims related to the facts and circumstances in the lawsuit. Finding that the language used was typical of language used in general releases and finding that the proposal was otherwise clear and unambiguous, the Fourth District reversed in favor of the Defendant.

Boatright v. Philip Morris USA, Inc., 218 So. 3d 962 (Fla. 2d DCA 4/12/17)

The Second District held that the trial court erred when it partially denied the Plaintiff's Motion to Tax Attorney's Fees and Costs based upon its conclusion that the Proposals for Settlement served by the Plaintiff upon the Defendants could not serve as a basis to award fees and costs because they were not served by email.

The Second District held that the statute and the rule governing Proposals for Settlement do not mandate email as the exclusive method for service. Moreover, the mandatory e-mail service requirement set forth in Florida Rule of Judicial Administration 2.516(b)(1) does not apply to service of pretrial Proposals for Settlement. Finding that the Plaintiff strictly complied with the statute and the corresponding procedural rules governing service of Proposals for Settlement by serving the proposals via certified mail and attaching to each of the proposals a certificate of service, the Second District held that the Plaintiffs were entitled to their fees and costs.

Sherman v. Savastano, 220 So. 3d 441 (Fla. 4th DCA 2017)

The Defendant served a Proposal for Settlement which provided that "the parties will execute a Joint Stipulation for Dismissal with Prejudice of the action" if the offer was accepted. Following a verdict favorable to the Defendant, the Defendant sought its attorney's fees pursuant to the proposal. The trial court denied same finding that the Proposal for Settlement was ambiguous and unenforceable because it was contingent on the execution of a "Joint Stipulation for Dismissal" even though there was only one Plaintiff and, also failed to provide the language of the Stipulation of Dismissal. The Fourth District found that the dismissal condition contained in the proposal was sufficiently clear to allow the Plaintiff to make an informed decision without requiring additional clarification and, therefore, reversed the order to award attorney's fees in favor of the Defendant.

Taylor Engineering, Inc. v. Dickerson Florida, Inc., 221 So. 3d 719 (Fla. 1st DCA 2017)

The First District reversed and found that the trial court erred in denying a Motion for Attorney's Fees on the basis that the Proposal for Settlement must strictly comply with the content requirements of Rule 1.442(c)(2) in order for the movant to be entitled to attorney's fees and costs. In this case, a nominal offer was made and the First District held that for purposes of the offer of judgment statute, a

nominal offer is made in good faith where the offeror has a reasonable basis to believe that its exposure to liability is minimal.

Dowd v. GEICO General Insurance Company, 221 So. 3d 772 (Fla 3d DCA 2017)

Following an award of attorney's fees pursuant to a Proposal for Settlement, the Third District reversed and found that the Proposal for Settlement was ambiguous and unenforceable because there was a discrepancy between the language in the Proposal and the much broader language in the release attached to the Proposal. Specifically, the Plaintiff may still have had a viable PIP claim against GEICO and it was unclear under the terms of the releases whether such a claim was intended to be included among those being released. As such, they found that the Plaintiff's decision to accept or reject the Proposal was reasonably affected by the ambiguity created by the documents.

Diecidue v. Lewis, 223 So. 3d 1015 (Fla. 2d DCA 2017)

The Second District reversed an award of attorney's fees and costs pursuant to a Proposal for Settlement finding that the release form attached to the proposal concerning a waiver of loss of consortium claim was ambiguous when read together with Florida Statute §768.0415 which allows unmarried dependent children to bring a loss of consortium claim based upon negligence. Here, the court found that the proposal was unenforceable because it would have been impossible for the Plaintiff to comply with the loss of consortium waiver because he could not honestly represent that he had no qualifying dependents under the statute. Additionally, the concurring Judge also found the proposal problematic because Allstate was to receive a "complete release and dismissal with prejudice of all claims" against it in this litigation. By contrast, the release attached to the Proposal for Settlement was "more than a mere release. It also contained indemnification and hold harmless provisions" which would expose the Plaintiff to future liability.

Polk County v. Highlands-In-The-Woods, LLC, 227 So. 3d 161 (Fla. 2nd DCA 2017)

The county filed a Proposal for Settlement in an action brought against it by a developer. The Second District held that the Proposal for Settlement was valid where it offered a specific sum in exchange for dismissal with prejudice of claims against the county and stated that it was intended as a full settlement of all claims asserted by the developer in the lawsuit. A general statement of the claims to be

resolved was sufficient to include all damages that would otherwise be awarded in a final judgment and the county was not required to include punitive damages in the proposal where Plaintiff was not seeking those damages.

Government Employees Insurance Company v. Macedo, 228 So. 3d 1111 (Fla. 2017)

The Supreme Court held that the trial court properly awarded attorney's fees and costs against the insurance company jointly and severally with its insured pursuant to Plaintiff's Proposal for Settlement. In this case, the policy index indicated that GEICO would make additional payments under liability coverages for legal expenses and court costs, the subsection of Additional Payments provision stated that GEICO would cover all investigative and legal costs, and another subsection of the same provision provided that GEICO would pay all reasonable costs provided by an insured at GEICO's request. Under these circumstances, the Supreme Court concluded that the policy was ambiguous regarding whether attorney's fees were included or excluded from coverage and under the long standing law that ambiguities must be construed in favor of coverage, the court found that GEICO's argument that "reasonable expenses incurred by insured at insurer's request" did not cover attorney's fees and costs under the Offer of Judgment statute was without merit because GEICO had control over settling the case.

McCoy v. R.J. Reynolds Tobacco Company, 229 So. 3d 827 (Fla. 4th DCA 2017)

The Plaintiff served a Proposal for Settlement on each of three Defendants via United States Certified Mail. The Plaintiff also filed a Notice of Serving the Proposal for Settlement via e-mail on the same date. The Defendants had actual knowledge of the Proposals for Settlement and did not accept them. After the trial, the Plaintiff obtained a verdict that entitled him to attorney's fees under Florida Statute §768.79. The Defendant opposed an award on procedural grounds arguing that the Plaintiff failed to e-mail the Proposals under Florida Rule of Judicial Administration 2.516. The Circuit Court denied the Motion for Fees on this basis and the Fourth District reversed noting that "where a party has actual notice of an Offer of Settlement and the offering party has satisfied the requirement of §768.79 on entitlement, to deny recovery because the initial offer was not e-mailed is to allow the procedural tail of the law to wag the substantive dog."

Golisting.com, Inc. v. Papera, 229 So. 3d 862 (Fla. 4th DCA 2017)

Golisting filed a lawsuit against the Paperas. It served a Proposal for Settlement on each of the Defendants. The Proposal for Settlement stated that "this Proposal, if accepted, is intended to terminate the litigation in its entirety, as it pertains to [Plaintiff's] claims against Defendants." The Proposal for Settlement contained a footnote which stated that an identical Proposal for Settlement had been forwarded to the other Defendant and that if either Defendant accepted their Proposal, the Plaintiff would terminate the litigation in its entirety as to both Defendants. They then explained that "put another way, if Defendant John Papera accepts this Proposal, [Plaintiff] will dismiss its claims against both John and Christine Papera. Therefore, it should be clear to both Defendants that [Plaintiff] is not seeking $40,000 from each Defendant, but is instead seeking a total of $40,000 from both Defendants. In the unlikely event that both Defendants timely accept and tender the $40,000 to Plaintiff, then Plaintiff shall return $20,000 to each Defendant." The Fourth District held that there was a sufficient apportionment set forth under the terms of the settlement Proposal and, therefore, Plaintiff was entitled to attorney's fees and costs.

Oldcastle Southern Group, Inc. v. Railworks Track Systems, Inc., 235 So. 3d 993 (Fla. 1st DCA 2017)

The First District held that the service requirements of Rule 2.516 do not apply to Proposals for Settlement.

Psychotherapist – patient privilege

Sajiun v. Hernandez, 226 So. 3d 875 (Fla. 4th DCA 2017)

A motorcyclist was killed after a collision with a truck driver. Following a verdict in favor of the Defendant, the Plaintiff appealed several evidentiary rulings which the Plaintiff contended required reversal either standing alone or when combined with the other rulings. At first, the trial court allowed a man sitting behind a privacy fence who only "heard" the motorcyclist proceeding on the adjacent road to testify that he believed the motorcyclist was speeding. It should be noted that the witness had operated a motorcycle since 1980 and could tell the difference between sounds emitted by the engines of a Japanese motorcycle and a Harley Davidson. The court allowed this testimony because two other defense witnesses, a mother and a daughter who were traveling together, encountered the motorcycle and testified that the noise of the engine drew their attention and that they commented to each other about how fast the motorcycle was going and that he had been cutting off cars.

The case also involved the psychotherapist-patient privilege. The Plaintiff's suit sought damages for pain and suffering and the trial court entered an agreed order allowing a Motion to Compel Production of the records of the psychotherapist who treated one of the children. Subsequently, the Plaintiff listed the records as a trial exhibit. At trial, the Plaintiff withdrew the mental anguish claim and argued for the reinstatement of the psychotherapist-patient privilege; however, the jury instruction included an instruction on pain and suffering. It is questionable as to whether that was wrong because the courts have ruled other non-economic damages besides mental anguish may be pursued without putting the Plaintiff's mental health at issue. Eventually, the Fourth District ruled that pursuant to Florida Statute 90.507, the voluntary disclosure of the records waived the privilege even though they noted that the waiver of the privilege itself was not irrevocable. That said, once the information was disclosed, the privilege ceases to exist.

Punitive damages

Hernando HMA, LLC v. Erwin, 208 So. 3d 848 (Fla. 5th DCA 2017)

In a 2-1 decision, the Fifth District denied certiorari after the trial court granted the Plaintiff's Motion to Amend to Add a Claim for Punitive Damages. The hospital argued that certiorari was proper because the trial court erroneously relied upon a Supreme Court case which was based upon a prior version of the punitive damages statute, rather than the amended statute which heightened the burden of proving an employer's fault from ordinary negligence to gross negligence. The majority denied the petition finding that the Defendants failed to properly raise this issue before the trial court.

Varnedore v. Copeland, 210 So. 3d 741 (Fla. 5th DCA 2017)

In this medical malpractice action, the Plaintiff moved to amend his Complaint to assert claims for punitive damages, but did not attach a copy of the proposed Amended Complaint to his motion. The Defendants objected to the lack of the proposed Complaint. The Plaintiff also served an evidentiary proffer in advance of the hearing, but also made additional, oral, evidentiary proffers during the hearing over the Defendant's objections. At the conclusion of a lengthy hearing, the trial court granted Plaintiff's Motion to Amend as to certain Defendants and denied it as to others. The trial court did not provide a basis for its rulings in its oral pronouncement or in its later written order.

The Fifth District granted certiorari and quashed the trial court's order finding that it departed from the essential requirements of law by granting the Motion to Amend to add a claim for punitive damages where the Plaintiff did not attach a copy of the proposed amendment to the motion. The District Court also found that the trial court departed from the essential requirements of law in overruling the Defendant's objections and permitting the Plaintiff to make inappropriate oral proffers. Lastly, it ruled that when a Motion to Amend to add punitive damages is granted, the trial court is required to make an affirmative finding that the Plaintiff has made a reasonable showing by evidence which would provide a reasonable evidentiary basis for recovering punitive damages.

Knauf Plasterboard Company, Ltd. v. Ziegler, 219 So. 3d 882 (Fla. 4th DCA 2017)

Knauf was sued in a prior unrelated case. In that case, the jury awarded punitive damages. They subsequently entered into a post-judgment settlement and recorded a satisfaction of judgment. In this case, the Defendant sought to avoid a punitive damages claim based upon Florida Statute 768.73(2) which prohibits a subsequent punitive damage award if punitive damages were previously awarded in another action. The trial court entered an order permitting the Plaintiff to conduct discovery on the amount actually paid in punitive damages from the prior settlement. The Fourth District granted certiorari finding that the trial court departed from the essential requirements of the law by construing the statute as permitting discovery of the amount of punitive damages the Defendants actually paid in a post-judgment settlement.

Leinberger v. Magee, 226 So. 3d 899 (Fla. 4th DCA 2017)

The Fourth District granted certiorari finding that the trial court failed to properly comply with Florida Statute §768.72(1). In doing so, the Fourth District noted that the moving party seeking an award of punitive damages must attach a proposed amended pleading to the motion seeking leave to amend. Further, the proffer or other evidence in the record to support the punitive damage claim must be served prior to the hearing on the Motion for Leave to Amend and must be served at least 20 days before the hearing. Third, the trial court must make an affirmative finding that the Plaintiff made a reasonable showing by evidence which would provide a reasonable evidentiary basis for recovering such damages if the Motion to Amend was granted.

Fetlar, LLC v. Suarez, 230 So. 3d 97 (Fla. 3d DCA 2017)

The Third District granted certiorari and held that the trial court improperly granted Plaintiffs' Motion to Amend its Complaint to add a claim for punitive damages because it did not attach a proposed Amended Complaint to the motion and failed to make a proffer required to assert punitive damage claims against the corporate Defendants.

Recusal

Herssein v. United States Automobile Association, 229 So. 3d 408 (Fla. 3d DCA 2017)

The Third District denied a Writ of Prohibition concluding that the fact that a trial Judge was a Facebook "friend" with a lawyer representing a potential witness and potential party in pending litigation before the court was not a valid basis for disqualification. In so doing, the court cited conflict to *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012).

Request for Admissions

Clemens v. Namnum, 233 So. 3d 1146 (Fla. 4th DCA 2017)

The Fourth District held that the trial court erred in denying a motion to correct the Plaintiff's admissions filed after new counsel realized that former counsel had incorrectly responded to a Request for Admission by admitting that the Plaintiff was not pursuing an agency claim against the hospital based upon the actions of one of the hospital's independently contracted physicians. The Fourth District held that the hospital could not establish that the amendment would result in undue prejudice where, from the inception of the lawsuit, the Plaintiff had alleged that the Defendant/physician "worked under the scope of agency of" the hospital and the hospital understood this to mean that the Plaintiff was alleging an agency-based cause of action against it. Further, discovery was ongoing and the matter was not yet set for trial and Plaintiff's counsel stipulated that the Plaintiff would respond to any additional agency discovery and would allow the hospital to re-depose any witness it wished.

Sanctions

R.J. Reynolds Tobacco Company v. Morales, 43 FLWD 63 (Fla. 3d DCA 12/27/17)

The Third District denied certiorari and upheld the trial court's order rescinding its prior order allowing the Defendant to substitute a new addiction expert and a new trial as a sanction for abusive discovery tactics by Defendant's counsel. Specifically, the trial court found that, in a 232-page transcript, R.J. Reynold's attorney made speaking objections or otherwise tried to influence his expert's testimony on at least 235 occasions.

Duarte v. Snap-On, Inc., 216 So. 3d 771 (Fla. 2d DCA 2017)

Following a non-evidentiary hearing, the trial court dismissed the Plaintiff's claim for fraud on the court for false or misleadingly incomplete discovery responses. The Second District reversed finding that, based upon the limited documentary record before the trial court, it was insufficient to justify a decision that dismissal, rather than impeachment at trial, or a traditional discovery sanction, was the appropriate remedy. Here they emphasized that the trial court failed to conduct an evidentiary hearing and thus lacked a sufficient evidentiary basis for determining that fraud on the court had occurred.

Estimable v. Prophete, 219 So. 3d 1001 (Fla. 4th DCA 2017)

The Fourth District reversed an order granting sanctions under Florida Statute 57.105 where the safe harbor letter failed to strictly comply with Rule 2.516 where the letter did not contain "SERVICE OF COURT DOCUMENT" following by the case number in the subject line and did not include in the body of the email the case number, name of the initial party and title of the documents served. Additionally, the moving party failed to attach a PDF copy or a link containing his Motion for Sanctions.

Kidde Fire Trainers, Inc. v. McCrea, 221 So. 3d 756 (Fla. 3d DCA 2017)

The Third District denied certiorari and found that there was competent substantial evidence to support the trial court's finding that discovery violations by a party were intentional causing the trial court to impose a sanction of the waiver of the work-product privilege as to numerous emails pertaining to the Defendant's investigations and actions following an incident involving the Plaintiff.

Isla Blue Development, LLC v. Moore, 223 So. 3d 1097 (Fla. 2d DCA 2017)

The Second District ruled that a Motion for Sanctions filed under Florida Statute §57.105 can be served by mail and need not be served pursuant to Rule 2.516(b)(1) which requires that "all documents required or permitted to be served on another party must be served by e-mail, unless the parties otherwise stipulate." They certified conflict with *Matte v. Caplan*, 140 So. 3rd 686 (Fla. 4th DCA 2014) in which the Fourth District applied the e-mail requirements of Rule 2.516 to a §57.105 motion.

Settlement agreement

State Farm Mutual Automobile Insurance Company v. Statsick, 231 So. 3d 528 (Fla. 2d DCA 2017)

The trial court vacated a stipulated judgement entered in settlement of an action to recover PIP benefits on the basis that there was "no meeting of the minds" as to whether the stipulated judgment would bar subsequent litigation involving the insurance company's obligation to cover medical expenses incurred by the insured subsequent to the stipulated judgment. The Second District reversed finding that if the stipulated judgment was entered pursuant to a void agreement, the judgment entered was merely voidable and not void and therefore did not fall within the Florida Rule of Civil Procedure 1.540(b)(4). Secondly, the District Court found that the trial court's finding that there was "no meeting of the minds" was not supported by competent substantial evidence and therefore, the trial court was instructed to reinstate the stipulated judgment.

Significant contact/relationship

Ward v. Morlock, 218 So. 3d 981 (Fla. 5th DCA 2017)

In this case, a Florida resident lent his vehicle to a resident of Pennsylvania who was involved in an accident in South Carolina with another Florida resident. The Fifth District held that Florida was the state with the most significant relationship as to the issue of vicarious liability and thus the dangerous instrumentality doctrine applied.

Stand Your Ground

Kumar v. Patel, 227 So. 3d 557 (Fla.2017)

Kumar attacked Patel without provocation at a bar. In reaction to Kumar's aggression, Patel struck Kumar's face with a cocktail glass, resulting in permanent loss of sight in Kumar's left eye. The State of Florida filed an information charging Patel with felony battery. Patel then moved to dismiss the information citing immunity from prosecution under the Stand Your Ground law. The trial court granted the motion holding Patel immune under the law. Kumar then filed a civil action against Patel for battery and negligence. Patel asserted as an affirmative defense the immunity found by the Circuit Court under the Stand Your Ground law and moved for Summary Judgment. The Circuit Court denied the Summary Judgment and ordered an evidentiary hearing to determine Patel's immunity. Before the hearing could be held, Patel filed a Petition for Writ of Prohibition with the Second District, arguing that the Circuit Court lacked jurisdiction over him in the civil case based upon the immunity determination in the criminal case. The Second District granted Patel's petition holding that Florida Statute §776.032 guarantees a single Stand Your Ground immunity determination for both criminal and civil actions. The Supreme Court unanimously held that the Stand Your Ground law does not confer civil liability immunity to a criminal Defendant based upon an immunity determination in a criminal case.

Suggestion of death

Northrop Grumman Systems Corp. v. Britt, 42 FLWD 1985 (Fla. 3d DCA 9/6/17)

The Third District held that the decedent's wife's Motion for Substitution for the decedent after her husband's death was not untimely where the motion was filed within 90 days after death was suggested upon the record. They further held that, because Plaintiff's counsel emailed a letter to the trial Judge and parties advising them of the decedent's death which was not filed with the court did not commence the 90-day period for filing the Motion for Substitution.

Summary Judgment

McNabb v. Bay Village Club Condominium Association, Inc., 216 So. 3d 688 (Fla. 2d DCA 2017)

The trial court granted Summary Judgment in favor of a Condominium Association in a slip and fall case determining, as a matter of law, that the Association did not have notice of an oil leak that allegedly caused the accident. In opposition to the Motion for Summary Judgment, the Plaintiff presented the Affidavit of a professional engineer who estimated the depth of the oil in the area and concluded that the oil had been leaking for approximately 18 days. The expert also opined that, even if the depth of the oil had been less, it would still have been leaking for at least 4 ½ days. The trial court discounted the expert's Affidavit finding that it both lacked credibility and left open other possibilities for why the fall occurred. The Second District reversed finding that the trial Judge erroneously weighed the credibility and reliability of the expert. At the same time, they recognized that trial Judges are not required to consider Affidavits that are not based upon personal knowledge or are devoid of evidentiary support; however, in this case, they found that the expert's Affidavit was based on personal knowledge and gleaned from analysis of record documents.

Lago v. Costco Wholesale Corp., 233 So. 3d 1248 (Fla. 3d DCA 2017)

The Plaintiff slipped on a liquid substance and fell and broke her knee as she was walking into a Costco. She sued Costco for negligent maintenance of the property. The trial court entered Summary Judgment finding that there was no evidence presented that the Defendant had actual or constructive knowledge of the liquid substance on the floor. The trial court's Summary Judgment was issued but did not contain a statement of the court's basis for granting Summary Judgment. While noting that a trial court's setting forth the basis of their holdings in granting Summary Judgment would facilitate appellate review, the Third District affirmed the lower court's granting of Summary Judgment noting that there is no requirement that the trial court explain its reasoning. It also upheld the determination that the Defendant had no actual or constructive knowledge of the liquid substance on the floor.

Wrongful death

Heiston v. Schwartz & Zonis, LLP, 221 So. 3d 1268 (Fla. 2d DCA 2017)

Following the death of a 16-year old in a motor vehicle accident, his parents attempted to be qualified as the Personal Representative of their son's estate. Both parents did not qualify and, as such, the decedent's brother was appointed as the Personal Representative. The law firm of Morgan & Morgan, P.A. represented the brother in his capacity as Personal Representative. Morgan & Morgan filed an action for wrongful death following which the respective carriers tendered their policy limits and death benefit. Schwartz & Zonis, LLP had a contingency fee agreement with the decedent's parents. Although they did not represent the Personal Representative, it actively pursued the wrongful death claim and sent demand letters to the two insurance companies and received the settlement drafts. They also filed a wrongful death action on behalf of the surviving parents and inaccurately described the father as being appointed as the Personal Representative. The trial court eventually awarded the entire fee to the firm that represented the decedent's statutory survivors and nothing to Morgan & Morgan who represented the Personal Representative. The Second District reversed and noted that, by statute, the Personal Representative is the only party with standing to bring a wrongful death action and settle the action. The trial court was ordered to award the full contingent fee to the attorneys for the Personal Representative and then reduce the fee award in a manner commensurate with the value, if any, of the services that Schwartz & Zonis, LLP provided to the statutory survivors.