CASE LAW SUMMARY
2010

Procedural and Legal Issues

Amendment of Pleadings

Capone v. Philip Morris USA, 35 FLW D2639 (Fla. 3d DCA 2010)

A wrongful death action was barred by the Statute of Limitations because a personal injury action abates upon the death of the decedent and a separate wrongful death action was not filed prior to the expiration of the two year Statute of Limitations for the cause of action. A personal injury claim is extinguished upon death of the Plaintiff and any surviving claim was be brought as a new and separate wrongful death claim.

The original Complaint could not be amended upon the decedent's death, to include a new wrongful death claim because the personal injury claim was extinguished upon the death of the Plaintiff. The survivor action is brought as a new and separate wrongful death action and cannot be brought as an amendment to the previously existing personal injury action.

Appeals

Soledispa v. LaSalle Bank National Association, 32 So. 3d 769 (Fla. 4th DCA 2010)

This appeal was dismissed because the notice of appeal was filed with the clerk more than thirty (30) days after the rendition of the final judgment. The Fourth District ruled that the clerk's date stamp was dispositive on the issue of the date of filing of a paper with the trial court, notwithstanding affidavits stating that the courier delivered the notice of the appeal to the clerk's office on an earlier date.

Arbitration

Rodriguez v. Builders FirstSource, 26 So. 3d 679 (Fla. 4th DCA 2010)

The purchasers of a home asserted personal injury claims for mold exposure against their builder. Because their claims were based on common law and not on the purchase agreement which contained an arbitration clause, the purchasers filed

suit against the builder. The trial court dismissed the claim and required that the matter be submitted to arbitration. Their decision was based upon the purchase contract which stated in part "This contract provides that all post-closing claims, disputes and controversies between the Purchaser and Seller would be resolved by binding arbitration … [including] any and all claims … which occur after closing (including, without limitation, any claim defect in or to the home …)"

Dunkin Donuts v. 330545 Doughnuts, 27 So. 3d 711 (Fla. 4th DCA 2010)

During a non-binding arbitration, a corporate Plaintiff was awarded $90,000. Following the non-binding arbitration, the Plaintiffs invoked their rights to a trial de novo. At trial, the jury found in favor of the Defendant. The Defendant then attempted to recover attorney's fees from the individual who controlled the corporate Plaintiff. Notably, the individual who controlled the corporate Plaintiff entered into a stipulation dropping his claim after the non-binding arbitration but before the trial de novo. The Fourth District affirmed finding that the individual/former Plaintiff was no longer a party subject to an award of attorney's fees pursuant to Florida Statute 44.103(6).

Kolsky v. Jackson Square, 28 So. 3d 965 (Fla. 3d DCA 2010)

The Third District held that defendants who are non-signatories to an agreement may nonetheless compel arbitration where the plaintiff's complaint alleges a conspiracy amongst the signatory defendant and the non-signatory defendants. They held that the non-signatory defendants may compel the arbitration based on the doctrine of equitable estoppel.

King's Academy v. Doe, 29 So. 3d 439 (Fla. 4th DCA 2010)

The plaintiffs filed suit for injuries sustained by their son following a fight with the school's football team. The defendants moved to dismiss the complaint and filed a motion to compel arbitration. Without holding an evidentiary hearing, the trial court granted the motion to compel. The Fourth District reversed and found that it was error to deny the motion to compel without first conducting a hearing as to whether there was substantive and procedural unconscionability surrounding the arbitration provision.

Carrollwood Care Center, LLC, v. Jaramillo, 36 So. 3d 180 (Fla. 2d DCA 2010)

The trial court erred in denying a Motion to Compel Arbitration on the ground that the arbitration agreement was void as against public policy where the public policy issue was never raised by the decedent's estate. The trial court was required to conduct an evidentiary hearing on the estate's claim that the arbitration agreement was procedurally unconscionable where the testimony proffered by the estate was sufficient to demonstrate that a disputed issue existed as to the entry of the agreement. If the trial court concludes on remand that the agreement was procedurally unconscionable, it must also make a determination whether the agreement is substantively unconscionable on the basis that it limits the discovery and non-economic damages.

Gordon v. Shield, 41 So. 3d 931 (Fla. 4th DCA 2010)

The patient sought treatment at the Strax Institute. Dissatisfied with the results, she filed a Notice of Intent. The physician and Strax Institute participated in pre-suit discovery and at the conclusion of the pre-suit period denied the claim. Thereafter, the Plaintiff filed suit against the physician and Strax and they, in turn, moved to dismiss the lawsuit and compel arbitration pursuant to a general consent executed by the patient prior to treatment. Although the Florida Supreme Court has found that the right of arbitration can be waived by actions inconsistent with the right to arbitrate, they found that the Defendant's participation in pre-suit did not constitute a waiver of the arbitration clause previously agreed to by the parties noting that all of the actions of the Defendants were compelled as a direct result of the Plaintiff having filed her Notice to Intent to Initiate Litigation.

Laizure v. Avante at Leesburg, 44 So. 3d 1254 (Fla. 5th DCA 2010)

The decedent's estate sued Avante alleging wrongful death and deprivation of statutory mandated nursing home resident's rights. Avante filed a Motion to Compel Arbitration based upon the arbitration agreement signed by the decedent upon admission to Avante. The estate opposed arbitration, contending that the agreement was procedurally and substantively unconscionable and that a wrongful death claim was not an arbitratable issue. The estate contended that the arbitration agreement did not and could not encompass a wrongful death claim because the claim did not belong to the decedent, but rather, was an independent claim belonging to the estate and statutory survivors. As such, the estate asserted that the decedent lacked the authority to bind the estate and his heirs to an arbitration agreement they did not sign.

The court certified the following question to the Florida Supreme Court: DOES THE EXECUTION OF A NURSING HOME ARBITRATION AGREEMENT BY A PARTY WITH A CAPACITY TO CONTRACT BIND THE PATIENT'S ESTATE AND STATUTORY HEIRS IN A SUBSEQUENT WRONGFUL DEATH ACTION ARISING FROM AN ALLEGED TORT WITHIN THE SCOPE OF AN OTHERWISE VALID ARBITRATION AGREEMENT.

Attorney's Fees

Dunkin Donuts v. 330545 Doughnuts, 27 So. 3d 711 (Fla. 4th DCA 2010)

During a non-binding arbitration, a corporate Plaintiff was awarded $90,000. Following the non-binding arbitration, the Plaintiffs invoked their rights to a trial de novo. At trial, the jury found in favor of the Defendant. The Defendant then attempted to recover attorney's fees from the individual who controlled the corporate Plaintiff. Notably, the individual who controlled the corporate Plaintiff entered into a stipulation dropping his claim after the non-binding arbitration but before the trial de novo. The Fourth District affirmed finding that the individual/former Plaintiff was no longer a party subject to an award of attorney's fees pursuant to Florida Statute 44.103(6).

Sea World of Florida v. Ace American Insurance, 28 So. 3d 158 (Fla. 5th DCA 2010)

Sea World was sued for personal injuries suffered by an individual while performing repair work on their premises. They ultimately settled his claim and then brought an action for contractual indemnity against Hobart. The jury determined that Hobart was solely responsible for the plaintiff's injuries and that Sea World was entitled to be fully reimbursed by them for the settlement payment made to the plaintiff, as well as, the amount expended for attorney's fees and costs in defending the claim. The trial court set aside the jury's award for attorney's fees because Sea World did not present independent expert testimony establishing the reasonableness of the fees expended in defending against the underlying claim. The Fifth District reversed and held that Sea World was not required to present independent expert testimony on this issue pursuant to the terms of the contract entered into between Sea World and Hobart.

Morrison v. West, 30 So. 3d 561 (Fla. 4th DCA 2010)

An attorney who is not licensed to practice law in the State of Florida and who did not comply with the rules which would permit him to practice in association with a Florida lawyer was not entitled to collect attorneys fees based upon quantum meruit in a probate and trust matter.

Underwood Anderson & Associates v. Lillo's Italian Restaurant, 36 So. 3d 885 (Fla. 1st DCA 2010).

The First District reversed an attorney's fees award under F.S. §627.428 which provides that upon rendition of the judgment *against an insurer* and in favor of any named insured . . . the court shall award the insured or beneficiary a reasonable sum as fees for the insured's attorney prosecuting the suit in which recovery is had.

The appellate court disagreed with the trial court in finding that an agent who merely facilitates that procurement of insurance policy in the state is "an insurer". Because an agent is not a party to the actual insurance contract with the insured, the attorney's fees statute does not apply in lawsuits brought by policyholders against an agent.

Rivero v. Meister, 46 So. 3d 1161 (Fla. 4th DCA 2010)

The Defendants and their attorneys failed to appear for jury trial. They did so because the failed to keep apprised of the cases ahead of them on the trial docket; failed to check their voicemail to see if the trial court called them to trial; and failed to notify the Plaintiff and the trial court that other courts called them to trial. In Plaintiff's motion for sanctions, the Plaintiff's counsel stated "No claim is made by undersigned counsel that opposing counsel did this knowingly or with intent." The trial court also found that attorney's fees were awardable as a sanction due to the "negligence" of defense counsel.

The Fourth District reluctantly reversed noting that the Supreme Court previously held that in order to assess attorney's fees against an attorney, the trial court must make an express finding of bad faith conduct which must be supported by detailed factual findings describing the specific acts of bad faith conduct which resulted in the unnecessary expenditure of attorney's fees. The Fourth District certified the following question: "Does the definition of 'bad faith conduct' … including reckless misconduct which results in the unnecessary incurrence of attorney's fees?"

Certiorari

Variety Children's Hospital v. Boice, 27 So. 3d 788 (Fla. 3d DCA 2010)

The plaintiff served a notice of intent on a physician. Six months later they filed an amended complaint naming the hospital as a defendant. The trial court dismissed the amended complaint against the hospital for failure to comply with presuit screening. The plaintiff then served a statutory notice of intent upon the hospital. On the same day, they also served a notice to produce documents and a subpoena duces tecum for videotaped deposition of numerous hospital personnel. The hospital moved for protective order and to quash the subpoenas on the grounds that the presuit period had not yet been completed. The trial court denied the motions.

The Third District issued a writ of certiorari and found that even though the complaint against the hospital involved the same issues relevant to the impending lawsuit against the hospital, because the hospital was not yet a party to the action, the plaintiff was not entitled to take formal discovery from the hospital.

AVCO Corp. v. Neff, 30 So. 3d 597 (Fla. 1st DCA 2010)

A private plane was involved in a crash in 2004. The NTSB investigated the crash and found that the carburetor was damaged and some of its related parts were worn. Less than 2 years after the accident, a complaint was filed against various defendants alleging, in part, that the carburetor installed in the aircraft was defectively designed and caused the crash. The complaint alleged that the engine manufacturer and corporate successor to the carburetor manufacturer knew that the design was subject to failure and that they failed to warn the FAA and the general public of such failures.

The defendants moved for summary judgment arguing that the claims were barred by the 18 year Statute of Repose under the General Aviation Revitalization Act (GARA) and the 12 year Statute of Repose under Florida law. AVCO asserted that it did not manufacture anything for the aircraft subsequent to its original delivery in 1981. The other defendants provided similar evidence. The trial court denied the defendant's motion for summary judgment and the defendant filed a Petition for Certiorari.

The First District found that these statutes were more akin to statutes of limitation rather than grants of qualified immunity. Therefore, any error

concerning the trial court's ruling on the affirmative defense could be corrected on an appeal from a final order and the fact that the defendants would incur litigation expenses was not enough to meet the test for irreparable harm for certiorari.

Herman v. J.P. Morgan Securities, Inc., 35 So. 3d 188 (Fla. 4th DCA 2010)

The trial court denied the Petitioner's Motion to Compel production of documents in response to interrogatories. The Fourth District found that this "constituted a blanket denial of a discovery request." Petitioner argued that this left him unable to defend the Respondent's Declaratory Judgment action and unable to prosecute his Counterclaim. Accordingly, the Fourth District found that the order constituted a departure from the essential requirements of law resulting in material harm of an irreparable nature. Accordingly, certiorari was granted.

Holland v. Barfield, 35 So. 3d 953 (Fla. 5th DCA 2010)

The Plaintiff sued the Defendant and five others alleging damages for the wrongful death of a man who fell from the 10th floor balcony of the Defendant's residence. The Plaintiff asked the Defendant to produce all computer hard drive and cell phone records from 24 hours before the accident to the present time. The trial court granted the Plaintiff's motion to compel production of these items. The Fifth District quashed the order and granted certiorari and found that the trial court's order was overbroad by allowing the Plaintiff to review, without limit or time frame, all of the information on Defendant's computer and mobile phone records. The district court noted that the trial court gave no consideration to her constitutional right of privacy, her right against self-incrimination or any privileges which might attach.

State Farm Florida Insurance Co. v. Kramer, 41 So. 3d 313 (Fla. 4th DCA 2010)

The insured sued State Farm for breach of contract. During discovery, the Plaintiffs requested the insurer's claim and underwriting files and documents from the insurer's litigation file. In response, the insurer moved for protective order. State Farm did not assert any privilege in objections but rather argued that, during breach of contract litigation, the insured is not entitled to discovery of the insurer's claims, underwriting and litigation files.

The trial court denied the motion for protective order and granted the Plaintiffs' motion to compel finding that a motion for protective order does not constitute a proper objection pursuant to Rules of Civil Procedure. Thereafter, the

insurance company filed a response to request for production and then asserted work product and attorney/client objections and also provided a privilege log. They also moved for reconsideration of the underlying order which the circuit court denied. The Fourth District granted certiorari and found that the insurance company had not waived its attorney/client and work product objections. They remanded the case to the trial court to evaluate the privilege objections and to conduct an in-camera inspection if necessary.

Target Corp. v. Vogel, 41 So. 3d 962 (Fla. 4th DCA 2010)

The trial court compelled production, prior to the taking of the Plaintiff's deposition, of four photographs of the accident scene and a security video of the Plaintiff's slip and fall. Target argued that the Plaintiff should be deposed before she sees the video and the photographs contending that the Plaintiff was not accurately portraying the accident because medical records were contrary to the video in question. The Plaintiff argued that she should be allowed to refresh her memory of the incident with the security video and accident photographs before being deposed.

The Fourth District distinguished this case from *Dodson v. Persell*, 390 So. 2d 704 (Fla. 1980) finding that the video in this case was not protected work product prepared to aid counsel in trying the case. Rather, it was a video of the accident itself. Further, the Fourth District found that even if the photographs were characterized as work product, there was no abuse of discretion in requiring production before the Plaintiff's deposition.

Claims File – Discovery

State Farm Florida Insurance Co. v. Kramer, 41 So. 3d 313 (Fla. 4th DCA 2010)

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insurance company filed a response to request for production and then asserted work product and attorney/client objections and also provided a privilege log. They also moved for reconsideration of the underlying order which the circuit court denied. The Fourth District granted certiorari and found that the insurance company had not waived its attorney/client and work product objections. They remanded the case to the trial court to evaluate the privilege objections and to conduct an in-camera inspection if necessary.

Collateral Sources

Ingenix v. Ham, 35 So. 3d 949 (Fla. 2d DCA 2010)

After a settlement in a medical malpractice case, the estate filed a motion for equitable distribution arguing that the health insurer was not entitled to full repayment of its bills pursuant to the language of the insurance policy. Instead, they argued that, pursuant to Florida Statute §768.76(4), the insurance company was only allowed reimbursement of its payments after a deduction for the health insurer's pro-rata share of attorney's fees and costs.

The Second District held that even when an insurance policy contains an absolute right of reimbursement, the statute applies and requires the reduction of the reimbursement by the pro-rata share of attorney's fees and costs.

Conferences with Non-Party Physicians

Hasan v. Garvar, 34 So. 3d 785 (Fla. 4th DCA 2010)

The trial court entered an order allowing a non-party treating physician to have an ex-parte pre-deposition conference with her own attorney provided that the patient's care and treatment not be discussed. The witness was insured by the same carrier who insured the named Defendants and the insurance carrier appointed counsel to represent the non-party physician at her deposition.

The attorney representing the non-party physician stated that he merely wanted to discuss deposition techniques with the physician. Noting that this was not a situation where a non-party treating physicians would have had an ex-parte conference with the Defendants' attorney nor was it a situation where the patient's treatment could be discussed, the Fourth District upheld the trial court's order.

Discovery of Hospital Charges

Columbia Hospital v. Hasson, 33 So. 3d 148 (Fla. 4th DCA 2010)

A non-party hospital in a motor vehicle negligence case was requested to produce through a subpoena duces tecum information pertaining to the amount the hospital charged patients with and without insurance; those letters of protection; and, differences in billing for litigation patients versus non-litigation patients. The hospital sought a protective order asserting that the information was confidential and amounted to protected trade secrets under Florida law.

The Court held that, where the party seeking such discovery is challenging the reasonableness and necessity of the medical expenses at issue, the requested information was subject to discovery. A confidentiality order should be fashioned to ensure that the non-party hospital's trade secrets, if any, were protected from disclosure outside of the litigation.

Forum Non Conveniens

Levinson and Lichtman, LLP v. Levinson, 35 So. 3d 182 (Fla. 3d DCA 2010)

The trial court abused its discretion in granting a Rule 1.061 Motion to Dismiss on the basis of forum non conveniens where the Plaintiff was seeking discovery which had been compelled by the trial court and neither the Order granting the Motion to Dismiss nor the transcript of the hearing demonstrated that the trial court performed the required analysis under the rule before granting the motion.

Fraud on the Court

Ford Motor Company v. James, 33 So. 3d 91 (Fla. 4th DCA 2010)

It was not an abuse of discretion to deny motions to transfer venue to the county in which the subject accident occurred where nine individuals who were in the van at the time of the accident and who were the only eyewitnesses resided in the county in which the lawsuit was filed; the van was rented in the county in which suit was filed; the van was kept and maintained in a neighboring county; and the material allegations of the Complaint involved potential manufacturing defects in the tires, design defect of the van, and negligent maintenance for which liability would turn primarily upon the testimony of expert witnesses. The Defendant did

not suggest that experts would be inconvenienced by trial in the county in which suit was filed.

It was noted that the convenience of witnesses was the single most important consideration because material witnesses should be located near the forum to allow for live testimony. Thus, the court must evaluate the prospective witnesses and the significance of their testimony. The other material considerations are convenience of the parties and interests of justice.

Gilbert v. Eckerd Corp., 34 So. 3d 773 (Fla. 4th DCA 2010)

The Plaintiff tripped and fell and sought damages against Eckerd for, amongst other things, past lost wages and future loss of earning capacity. Her lost wage claim was based upon a disputed two month employment with Gold Coast Services. She testified in deposition that she worked at Gold Coast as a salesperson and stated that she worked on 12% commission and estimated that she earned $1,600 during her two month employment. As a result of her injuries, she allegedly could no longer carry concrete samples so she quit her job at Gold Coast.

The Defendant deposed the Plaintiff's husband who testified that his wife never worked for Gold Coast and had not worked at all for at least four years prior to that. Eckerd also deposed the owner and general manager of Gold Coast who testified that he also never hired the Plaintiff as an employee or independent contractor and there was no record of her ever having worked there. The sales manager who allegedly hired her filed an affidavit stating that she never hired, trained or supervised the Plaintiff and that the Plaintiff was never employed by Gold Coast.

Eckerd then filed a Verified Motion to Dismiss for fraud on the court. In response to the motion, the Plaintiff produced photocopies of two checks made payable to her during the relevant time period by Gold Coast. The owner/general manager of Gold Coast testified that the checks made payable to the Plaintiff were actually for work performed by her husband. Her husband then filed an affidavit in which he corroborated the owner's testimony about the checks.

In reversing the trial court's dismissal of the action, the Fourth District noted that Eckerd could not explain why the Plaintiff reported the income from these checks on her tax return as self-employment income. Further, the trial court did not make any express, oral or written findings of fact and the written order granting the motion was non-specific. While there is nothing which requires an evidentiary

hearing to be held to address a motion to dismiss for fraud, the Fourth District opined that the better practice is for the trial court to conduct an evidentiary hearing on the motion and make specific findings. Finding that Eckerd did not produce clear and convincing evidence that the Plaintiff had perpetuated a fraud on the court, the Fourth District reversed.

Hernandez v. City of Miami, 35 So. 3d 942 (Fla. 3d DCA 2010)

The Plaintiff sued the City for injuries sustained after falling into a defective storm drain on a City's sidewalk. The Defendants moved to strike the claim alleging fraud because there were discrepancies in the Plaintiff's answers to interrogatories and during deposition testimony regarding his injuries. The trial court struck the pleadings and dismissed the case with prejudice.

While noting that a trial court has the inherent authority to dismiss an action as a sanction when a Plaintiff has perpetuated a fraud, the Third District Court noted that the power must be exercised cautiously and sparingly and only upon a clear showing of fraud. As such, in order to properly exercise its discretion, a trial court must have an evidentiary basis to dismiss the case based upon a clear and convincing evidentiary basis.

Hair v. Morton, 36 So. 3d 766 (Fla. 3d DCA 2010)

It was error to dismiss the Plaintiff's claim on the basis of fraud for allegedly false responses to interrogatories and deposition testimony where the issue of liability was not addressed. While the Plaintiff's discovery responses might preclude some of her claimed damages based on fraud, where they did not address all of the Plaintiff's claimed damages or the issue of liability, dismissal could not be justified.

Sky Development, Inc. v. Vistaview Development, Inc., 41 So. 3d 918 (Fla. 3d DCA 2010)

During the deposition of Sky's manager, Sky's chief financial officer passed the deponent a note which stated "don't worry about pleasing him. Just say no." The note was brought to the attention of the Magistrate presiding over the deposition and she forbade any further notes. At trial, Sky's CFO was being questioned about whether Sky received a key document. During a side bar, while the CFO was still on the stand, Sky's sole shareholder sent the CFO two text messages regarding receipt of the document. Upon discovering the text messages,

the trial court declared a mistrial and invited Defendants to move for dismissal. They then did so and the court dismissed the Complaint with prejudice. The Third District affirmed the lower court's final judgment finding that it was not an abuse of discretion in finding that the misconduct was certainly a "blatant showing of fraud, pretense, collusion or other similar wrong doing."

HMO's

Joseph Riley Anesthesia Associate v. Stein, 27 So. 3d 140 (Fla. 5th DCA 2010)

Patients were members of an HMO that had an agreement in place with a hospital and its surgeons. There was no contract between the HMO and the anesthesia group. The patients underwent surgery at the hospital and, thereafter, the anesthesiologist billed the HMO for their work; however, they did not receive payment in full from the HMO. The anesthesiologist, in turn, attempted to collect the balance from the patients.

The Fifth District affirmed the trial court's decision that the anesthesiologist could not collect for the balance of their payments from the patients based upon Florida Statute 641.3154(4) which provides that "a provider … regardless of whether the provider is under contract with the health maintenance organization, may not collect or attempt to collect money from … a subscriber of an organization for payment of services for which the organization is liable, if the provider in good faith knows or should know that the organization is liable".

In so ruling, the Fifth District noted that the anesthesiologist clearly knew that the HMO was liable based upon the fact that they had billed them for the services rendered. Further, "hospital-based providers like [the anesthesiologist] are deemed authorized by virtue of their exclusive contract to provide anesthesia services at [the] hospital, must fall within the hospital's authorization for services. There is no question that the anesthesia services were medically necessary for the surgeries, as they were requested by the surgeons, and the contract between [the HMO and the hospital] recognized this relationship."

IME

Gaskins v. Canty, 29 So. 3d 432 (Fla. 2d DCA 2010)

The trial court ordered that the plaintiff attend a vocational rehabilitation examination. The order provided that the examination could be recorded by using

an unattended videotape or audiotape machine, but it prohibited the presence of any third person such as a videographer or the plaintiff's attorney.

After the defendant sought the examination, the plaintiff responded that she would appear for the examination accompanied by her counsel or a videographer. The defendant filed a motion to compel the examination with limitations and attached an affidavit from the examining expert who asserted that the examination involved time testing that could not be interrupted by the changing of videotapes; the presence of a videographer could negatively affect the examination; and numerous psychological articles show that observation might affect the examination.

The Second District quashed the trial court's order and granted certiorari. In doing so, they noted that while this was originally a request for a rehabilitation examination, the request was amended to be for a life plan examination because the plaintiff had dropped her claim for future loss of earning capacity. The examining expert was not present at the hearing and did not provide any evidence concerning the specifics of a life plan examination or why the presence of third person would disrupt the examination. Further, there was no evidence presented that no other examiner would conduct the examination with a third person present.

Indemnity

Sea World of Florida v. Ace American Insurance, 28 So. 3d 158 (Fla. 5th DCA 2010)

Sea World was sued for personal injuries suffered by an individual while performing repair work on their premises. They ultimately settled his claim and then brought an action for contractual indemnity against Hobart. The jury determined that Hobart was solely responsible for the plaintiff's injuries and that Sea World was entitled to be fully reimbursed by them for the settlement payment made to the plaintiff, as well as, the amount expended for attorney's fees and costs in defending the claim. The trial court set aside the jury's award for attorney's fees because Sea World did not present independent expert testimony establishing the reasonableness of the fees expended in defending against the underlying claim. The Fifth District reversed and held that Sea World was not required to present independent expert testimony on this issue pursuant to the terms of the contract entered into between Sea World and Hobart.

Jurisdiction – Corporate Shield Doctrine

Hurt v. Kitroser, 50 So. 3d 62 (Fla. 4th DCA 2010)

A commercial truck driven by Airgas Carbonic's employee struck a car and killed the occupants. The Personal Representative sued Airgas Carbonic, a foreign corporation, as well as, the truck's driver and various other employees. It was alleged that each of the men was responsible for training or overseeing the training of Airgas drivers and that each had personally trained the driver and had reviewed his performance while based at the Bartow, Florida plant of Airgas. The trial court denied the Defendant's Motion to Quash Service of Process and Motion to Dismiss for Lack of Jurisdiction. The Fourth District reversed and noted that the Corporate Shield Doctrine protects corporate agents from being subjected to Florida jurisdiction for acts performed while conducting business in Florida on behalf of a corporation. The rationale for this rule is that "it is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his benefit, but for the benefit of his employer".

Jurisdiction over Non-Residents

Internet Solutions Corporation v. Marshall, 39 So. 3d 1201 (Fla. 2010)

A non-resident commences a tortuous act within the State of Florida for purposes of Section 48.193(1)(b), Florida Statutes, when he or she makes allegedly defamatory statements about a company whose principle place of business is in Florida by posting those statements on a website where the website posts containing these statements are accessible and accessed in Florida.

The nature of the internet is fundamentally different than that of a telephone call, simple e-mail or letter. By posting the statements on her website, the Defendant made the material as accessible to anyone with internet access worldwide. Thus, once allegedly defamatory material is published on the internet, and accessed in Florida, a tortious act of defamation has been committed within Florida for purposes of the Long Arm Statute.

Litigation Privilege

DelMonico v. Traynor, 50 So. 3d 4 (Fla. 4th DCA 2010)

The Plaintiff sued Defendants, including an attorney, for defamation and tortuous interference with a business relationship. The Plaintiff alleged that the attorney published defamatory statements about the Plaintiff including that the Plaintiff hired prostitutes to get business and that he was facing prosecution for prostitution. These statements occurred during potential witness interviews and were purportedly made for the purpose of defending his client in the underlying litigation. The trial court granted summary judgment in favor of the attorney based upon an absolute immunity conferred by the litigation privilege. The Fourth District held that because the statements complained of were made by the attorney while he was acting as defense counsel in the underlying litigation and because the statements had "some relation" to the proceeding, they were absolutely privileged as a matter of law.

Medicare/Medicaid Liens

Russell v. Agency for Health Care Administration, 23 So. 3d 1266 (Fla. 2d DCA 2010)

The Plaintiff filed a medical malpractice action on behalf of her son. A settlement was reached and the trial court ordered full satisfaction of the Medicaid lien from the proceeds of the settlement. The case was settled for $3 million dollars and the lien was for $221,434. The settlement agreement contained no allocation of the amount recovered amongst the various elements of damages suffered nor did the parties to the settlement or AHCA otherwise agree to such an allocation. Because the lien amount did not exceed 50% of the amount recovered by the settlement, the Second District affirmed the trial court's decision finding that AHCA was entitled to full satisfaction of its lien pursuant to Florida Statute 409.910 (11)(f)(1).

The Second District rejected the Plaintiff's reliance on the United States Supreme Court decision of *Arkansas Department of Health v. Ahlborn*, 547 U.S. 268 (2006) finding that in *Ahlborn*, the state stipulated to the portion of the settlement attributable to the medical expenses also noting that it exceeded that portion of the settlement that represented payment for medical care. In this case, there was no such stipulation and no similar basis for determining an allocation of the settlement proceeds.

Offer of Judgment/Proposal for Settlement

Nilo v. Fugate, 30 So. 3d 623 (Fla. 1st DCA 2010)

The Plaintiff served a Proposal for Settlement in the amount of $400,000. The jury returned a verdict for $495,246.41. Post-verdict, the Plaintiff moved for taxable costs in the amount of $29,641.95 and the trial court entered an order taxing costs in the amount of $32,423 resulting in a judgment for $527,669.41. Based upon this judgment, the trial court then awarded attorney's fees pursuant to the Proposal for Settlement.

The First District reversed the cost award in part because it exceeded the amount requested by the Plaintiff. Further, the award of attorney's fees pursuant to the rejected Proposal for Settlement was reversed because "only those costs incurred pre-demand may be considered in determining whether the total judgment meets the statutory threshold. Because the Plaintiff did not incur the $4,753.59 in additional costs needed to reach the statutory threshold before tendering the Proposal for Settlement, the award of attorney's fees was reversed.

Smith vs. Loews Miami Beach Hotel, 35 So. 3d 101 (Fla. 3d DCA 2010).

The trial court erroneously awarded attorney's fees to the defendant hotel pursuant to a Proposal for Settlement involving the Plaintiff's first Notice of Voluntary Dismissal. At the hearing for attorney's fees, the Plaintiff's attorney successfully preserved her objection that the proposal was not made in good faith and that the Voluntary Dismissal did not act as a disposition on the merits because it was the first notice of dismissal which was without prejudice. The court found that, pursuant to the Fla.R.Civ.P. 1.420(a)(1), unless otherwise stated in the notice or, the dismissal is without prejudice except on a notice of dismissal operating as an adjudication on the merits when served by a Plaintiff who already once dismissed the same action. The parties seeking affirmative relief has an absolute right to dismiss the entire case once without court order at any time before a hearing on the summary judgment motion.

Nationwide Mutual Fire Insurance Co. v. Pollinger, 42 So. 3d 890 (Fla. 4th DCA 2010)

The Plaintiff filed a two count Complaint against Nationwide for PIP benefits and Uninsured Motorist benefits. Nationwide hired one law firm to defend the PIP claim and a different attorney to defend the Uninsured Motorist

claim. Each law firm filed its own separate Answer and Affirmative Defenses. Thereafter, the uninsured motorist attorney filed a Proposal for Settlement which stated, in part, "in exchange for the payment set forth above, the Plaintiff … will dismiss the Defendant … from all claims, causes of action, and damages arising from the incident or accident giving rise to this lawsuit and will dismiss this lawsuit with prejudice."

The Fourth District found that this Proposal for Settlement constituted a latent ambiguity. They pointed out that while Nationwide retained two different law firms to defend the different claims, the Offer was presented and signed by only one of them. As such, they concluded that the Offer was ambiguous because it was unclear whether the Offer covered just the Uninsured Motorist claim or whether it included the PIP claim as well. Judge Warner concurred in the reversal of the award of attorney's fees in favor of Nationwide finding that the use of the two different attorneys did not create a latent ambiguity. Rather, based upon the fact that the PIP attorneys filed a separate Proposal for Settlement during the same thirty day acceptance period for the original Proposal, Judge Warner found that there was an ambiguity based on the extrinsic facts of the case.

Darrow v. Heitman, 46 So. 3d 184 (Fla. 2d DCA 2010)

The Defendant filed an Offer of Judgment/Proposal for Settlement and, as a condition of the proposal, the Plaintiff had to sign "a release". The Defendant did not provide either a summary of the release or proposed copy of the release. The Second District affirmed the denial of attorney's fees under the proposal for settlement noting that a release is a condition that must be stated with specificity in a proposal for settlement and that it must be presented with sufficient clarity that it should be capable of execution without the need for a judicial interpretation.

Jessla Construction Corp. v. Miami-Dade County School Board, 48 So. 3d 127 (Fla. 3d DCA 2010)

In this wrongful termination claim, the School Board filed an offer of judgment/proposal for settlement which provided that "this proposal is conditioned upon the acceptance of an unconditional general release by Jessla, forever releasing the School Board from any claim, damages and relief which it now has or could ever have in the above-captioned action. The release should be substantially in the form attached hereto as Exhibit 'A'". The unconditional general release which was attached provided that Jessla, including all its past, present and future affiliates, subsidiaries, parent companies and all of its respective officers, directors,

partners, shareholders, employees, representatives, agents, successors and assigns … hereby remise, release … and forever discharge … the School Board … of all claims asserted in Jessla's Second Amended Complaint…".

During the proposal's 30 day period, the School Board submitted a letter to Jessla's attorney titled "Final Demand for Dismissal of Lawsuit". The demand letter provided that if Jessla voluntarily dismissed its claims with prejudice against the School Board, the School Board would not seek attorney's fees and costs. The date in the demand letter preceded the expiration of the proposal for settlement. Jessla did not accept the proposal nor did it voluntarily dismiss the lawsuit.

The trial court eventually awarded attorney's fees and costs to the School Board and the Third District affirmed finding that the demand letter in no way affected or impacted the validity of the proposal. Rather, the demand letter merely outlined alleged misrepresentations made during a summary judgment hearing which allegedly permitted Jessla to survive summary judgment. Further, the demand letter did not state or suggest that the School Board was withdrawing its proposal for settlement. Additionally, the Third District concluded that the proposal and general release were not ambiguous and did not require the participation of non-parties noting that "the complained of language in the general release which defines Jessla as including 'past, present and future affiliates' is not too broad and is 'typical of the language contained in many general releases.'"

Pre-Judgment Interest

Westgate Miami Beach, Ltd. v. Newport Operating Corp., 35 FLW S735 (Fla. 12/16/10)

The trial court entered a Final Judgment in favor of a plaintiff and the Final Judgment included the language "for which let execution issue". The Final Judgment further provided "a separate order will be entered awarding pre-judgment interest." The plaintiff then promptly filed a Motion to Assess Pre-Judgment Interest. Prior to entering an order awarding the interest, the trial court noted that it needed to revisit the issue of damages and defense counsel asserted that inasmuch as the trial court had already found entitlement to pre-judgment interest, the Final Judgment was a final order that could be appealed and the amount of pre-judgment interest could be calculated after the appeal. Based on earlier Supreme Court precedent, the trial court subsequently denied the award of pre-judgment interest. The Supreme Court receded from its earlier decision and held that a trial court can reserve jurisdiction in a Final Judgment to award pre-

judgment interest. They also held that a Final Judgment reserving jurisdiction to award pre-judgment interest is a final appealable order, but the trial court does not lose jurisdiction to determine the amount of the interest in a manner similar to that in which the trial court addresses claims for attorney's fees and costs.

Bosem v. Musa Holdings, Inc., 46 So. 3d 42 (Fla. 2010)

When a verdict liquidates damages on a Plaintiff's out-of-pocket, pecuniary losses, the Plaintiff is entitled, as a matter of law, to prejudgment interest from the date of that loss.

Psychotherapist-Patient Privilege

Cruz-Govin v. Torres, 29 So. 3d 393 (Fla. 3d DCA 2010)

The Defendant was sued for injuries and wrongful death following a motor vehicle accident. After filing suit, the plaintiff learned that, several months after the accident, the defendant had been admitted to a drug rehabilitation facility. The plaintiff then sought copies of the post-accident substance abuse treatment records. The defendant objected to the production of the records; however, the trial court ordered their production.

The Third District granted certiorari and reversed the trial court. Although Florida Statute 90.503(4)(c) provides an exception to the psychotherapist-patient privilege, it only requires a party to produce communications relevant to an issue involving a mental or an emotional condition when the patient relies upon the condition as an element of his or her claim of defense. The Third District found that the statutory exception applies when the patient and not the opposing party seeks privileged information. Further, the Third District held that the defendant did not place his mental or emotional condition at issue by merely denying the plaintiff's allegations or suggestions that he was impaired at the time of the accident.

Urbanek v. Gerald Urbanek, Commercial Management Corp., 46 So. 3d 1235 (Fla. 4th DCA 2010)

In proceedings involving an irrevocable trust and indemnification claim, the petitioner filed an affidavit from his psychologist. The affidavit was filed in response to the respondent's position that petitioner was being purposefully isolated and sequestered in an effort to frustrate discovery and avoid certain

meetings. The psychologist's affidavit addressed the isolation theory based on his evaluation of the petitioner and the family dynamics. The petitioner subsequently withdrew the affidavit; however, the respondent sought to depose the psychologist and the trial court denied the motion for protective order.

The Fourth District granted certiorari and quashed the order denying the motion for protective order and held that any initial waiver of the privilege was revoked when the petitioner withdrew the affidavit. Further, the affidavit was submitted in connection with issues which were and which remain collateral to the underlying claim and the respondent had not demonstrated that the substance of the affidavit was tied to the petitioner's answer, affirmative defenses or counterclaim.

Releases

McKeever v. Rushing, 41 So. 3d 920 (Fla. 2d DCA 2010)

Prior to the initiation of automobile negligence litigation, McKeever negotiated a property damage settlement with Coastal. McKeever was asked to execute a document entitled "Property Damage Release". Following payment and execution of the Release, McKeever continued to have conversations with Coastal regarding a personal injury lawsuit. The action was filed and Coastal did not raise the Release as an affirmative defense.

Coastal moved for summary judgment arguing that McKeever waived his personal injury claim by signing the Release. McKeever presented an affidavit in opposition stating that he only intended to release his property damage claim. Letters which were sent to Coastal following execution of the Release signified no intent to settle any personal claim were introduced without objection.

The trial court erred by entering summary judgment on the Release. The Release was never intended by McKeever to release his personal injury claim. The title of the Release, language of the body of the Release, and the fact that the settlement check reflected amount the property damages and not personal injury claim suggested mistaken fact.

Suggestion of Death

Schaeffler v. Deych, 38 So. 3d 796 (Fla. 4th DCA 2010)

The Plaintiff sued the Defendant alleging that he negligently drove his car and struck the Plaintiff as she was walking her bicycle across the street. Shortly before a jury trial, the Defendant died. Defense counsel filed a Suggestion of Death; however, instead of seeking to abate the proceedings until the estate could be substituted as a party at trial, defense counsel continued to defend the case. Thereafter, defense counsel filed a Notice of Admission of Liability and the case then proceeded to trial. Final Judgment was then entered against the decedent. Several weeks before the trial, the estate of the decedent was opened in New York and was represented by counsel. Post-judgment, the defense counsel filed a Motion for New Trial, staying proceedings and joinder of indispensable party (the estate). The motion essentially argued that the case should not have proceeded to trial without substitution of the estate as the Defendant.

The Fourth District reversed the Final Judgment noting that the estate's due process rights were violated because the death of the Defendant limited the authority of his counsel to proceed and in particular counsel lacked authority to file the Admission of Liability. Accordingly, a new trial was granted.

Timeliness of Notice of Appeal

Strax v. Shield, 49 So. 3d 741, (Fla. 2010)

The issue in this case focused on the timeliness of a notice of appeal. The clerk's office stamp was one day beyond the time limit for filing the appeal. The attorney filing the appeal filed an affidavit reflecting that the notice of appeal was timely placed in her office's outbox and her courier filed an affidavit indicating that the notice of appeal was not picked up until the day after. Florida Rule of Civil Procedure 1.080(e) provides that the clerk's stamp is dispositive on the issue of the date of filing a paper with the trial court.

The Fourth District noted conflict with the Third District which had previously ruled that, while the clerk's stamp was presumptive, same could be rebutted by other evidence demonstrated that the notice of appeal was timely filed. The Fourth District adopted the holding of the Third District, holding that the clerk's stamp presumption could be overcome by sufficient evidence that the document was actually received by the clerk within the time deadline.

Work Product

Target Corp. v. Vogel, 41 So. 3d 962 (Fla. 4th DCA 2010)

The trial court compelled production, prior to the taking of the Plaintiff's deposition, of four photographs of the accident scene and a security video of the Plaintiff's slip and fall. Target argued that the Plaintiff should be deposed before she sees the video and the photographs contending that the Plaintiff was not accurately portraying the accident because medical records were contrary to the video in question. The Plaintiff argued that she should be allowed to refresh her memory of the incident with the security video and accident photographs before being deposed.

The Fourth District distinguished this case from *Dodson v. Persell*, 390 So. 2d 704 (Fla. 1980) finding that the video in this case was not protected work product prepared to aid counsel in trying the case. Rather, it was a video of the accident itself. Further, the Fourth District found that even if the photographs were characterized as work product, there was no abuse of discretion in requiring production before the Plaintiff's deposition.

Worker's Compensation Immunity

Catalfumo Construction v. Varella, 28 So. 3d 963 (Fla. 3d DCA 2010)

A subcontractor was leaving the job site and going home when he fell over some cement runoff and was injured. His employer denied worker's compensation benefits to him on the grounds that the accident did not happen within the course and scope of his employment. The worker then sued the general contractor for negligence. The Third District found that the general contractor was a statutory employer as defined in§ 440.11, Fla. Stat. and, therefore, was obligated to provide worker's compensation insurance even when the subcontractor did not. As a result, the general contractor was required not only to provide the coverage for its employee, but was also protected from suits such as this case. The court reversed the order finding no compensation immunity.

Coastal Masonry, Inc. v. Gutierrez, 30 So. 3d 545 (Fla. 3d DCA 2010)

The plaintiff filed a petition seeking worker's compensation benefits from his employer, Coastal, for injuries sustained while lifting concrete blocks. In response to the petition, Coastal denied the claim in its entirety including that his

condition arose out of the course and scope of employment. Based upon Coastal's denial, the employee voluntarily dismissed his petition for worker's compensation benefits and then filed a negligence action against Coastal. In its response to the complaint, Coastal raised the worker's compensation immunity and moved for summary judgment. The trial court denied the motion for summary judgment. The Third District affirmed and found that the employer was estopped from raising the worker's compensation exclusivity defense in the negligence action.