Procedural and Legal Issues

Arbitration – Legal Services

Johnson, Pope, Bokor, Ruppel and Burns, LLP v. Forier, et al., 67 So. 3d 315 (Fla. 2d DCA 2011)

An arbitration clause which is part of a legal services contract between an attorney and the client that requires arbitration of any legal malpractice claim arising out of the contract does not violate Florida public policy. There is no Florida case law providing that it is against public policy to include such a clause in a legal services contract and there are no constitutional or statutory provisions prohibiting such agreements on public policy grounds. In addition, the clause itself was neither substantively nor procedurally unconscionable. The agreement was therefore legal and enforceable.

Attorney's Fees

Sexton v. Ferguson, 36 FLW D2489 (Fla. 4th DCA 11/16/11)

Wild Turkey obtained a consumptive use permit to de-water a sand mine located adjacent to Ranch Management Consultants cattle ranch operation. RMC objected that their ranch would be adversely impacted. They ultimately requested that the matter be referred to the Division of Administrative Hearings for a formal hearing. Wild Turkey then filed a Motion for Attorney's Fees pursuant to Florida Statute 57.105 through their counsel John Ferguson. RMC then filed their own motion. RMC moved a summary final order denying Wild Turkey's Motion for Attorney's Fees. Following this, Ferguson withdrew as counsel and Wild Turkey failed to file any documents in response. Soon after Ferguson withdrew, Wild Turkey negotiated a settlement to resolve all disputes. RMC dismissed their request for administrative hearing and also notified that they withdrew their pending Motion for Attorney's Fees against Wild Turkey. Thereafter, however, they sought attorney's fees from Mr. Ferguson. The District Court ruled that Florida Statute 57.105(1) is clear and unambiguous and does not authorize attorney's fees to be awarded solely against a party's attorney and, therefore, affirmed the ALJ's decision that RMC was not entitled to attorney's fees from John Ferguson.

Wood v. Haack, 54 So. 3d 1082 (Fla. 4th DCA 2011)

The Defendant filed a Motion for Sanctions under Florida Statute 57.105 at the time that a Third Amended Complaint was pending. The motion stated that the case was filed without merit at its inception. The Fourth District held that the trial court erred in limiting attorney's fees to the date of service of the Third Amended Complaint. They also held that it was in error to award attorney's fees for the time incurred in litigating the amount of fees to be awarded.

Morgan and Morgan, P.A. v. Guardianship of Larry McKean, 60 So. 3d 575 (Fla. 2D DCA 2011)

The trial court erred in concluding that fees could not be awarded solely because counsel did not keep, or attempt to create, accurate time records. Although time spent on a case is one factor to be considered under a quantum meruit theory, a trial court must also consider the totality of the circumstances when computing the reasonable value of services rendered for purposes of attorney's fees. Factors to be considered include the actions taken by the attorney or client before or after discharge and the benefit actually conferred upon the client. The weight to be given to the various factors and the ultimate determination as to the amount to be awarded are matters left up to the sound discretion of the trial court.

Western and Southern Life Insurance Company v. Beebe, 61 So. 3d 1215 (Fla. 3d DCA 2011)

The insured was successful in an action brought for life insurance benefits. The insurance company conceded that the insured was entitled to attorney's fees; however, the amount was contested. Although the contract between the insured and her attorney provided for a fee of $300 per hour, the trial court awarded an hourly rate of $350 per hour. The Third District reversed noting that the contract was clear and unambiguous and, moreover, the attorney for the insured swore that the $300 per hour was a reasonable rate for services.

Guarantee Insurance Company v. Worker's Temporary Stacking, Inc., 61 So. 3d 1233 (Fla. 5th DCA 2011)

Guarantee Insurance filed a Complaint for alleged failure to pay additional premiums owed under a Worker's Compensation policy. Although the original policy was attached to the Complaint, the insurance company failed to attach the

policy renewals. The lower court granted a Motion to Dismiss for failure to attach the policy renewals and gave the insurance company 20 days to file an Amended Complaint. Before the time period to file the amendment lapsed, the insurance company filed a Notice of Voluntary Dismissal without Prejudice. The insured then filed a Motion for Attorney's Fees and Costs. The Fifth District reversed the trial court's award finding that the voluntary dismissal was neither a judgment nor the functional equivalent of a confession of judgment - - which is a precondition to an award under Florida Statute 627.428.

Guy Bennett Rubin, P.A. v. Guettler, et al., 73 So. 3d 809 (Fla. 4th DCA 2011)

This case involved an attorney's fee contract and contingent fee agreement. It was held that a representation agreement between an attorney and his client was unenforceable as a matter of law where there was a provision contained in the agreement mandating immediate payment of accrued hourly rate upon discharge of the attorney. This clause constituted a "penalty clause" in violation of applicable Bar rules.

On appeal, the Court noted a Florida Bar member who has entered into an improper fee agreement is nonetheless entitled to receive a reasonable value of his or her services based upon quantum meruit. However, such an action only lies when the Plaintiff is successful in the underlying litigation and here, there was no evidence to suggest that the Plaintiff would get anything as a result of the litigation.

Certiorari

Heathrow Master Association v. Zulia, 52 So. 3d 811 (Fla. 5th DCA 2011)

The Plaintiff contended that she suffered from RSD as a result of a fall. The Defendant retained a pain management specialist and, thereafter the Plaintiff sought information from the Defendant regarding the number of times that the expert had testified for the defense; the identity of the actions in which the expert had appeared as a witness or gave a deposition in the last three years; and the total amount of money that the expert was paid in those cases. The Defendant complied in part and objected in part claiming that the discovery was inappropriate. Rather than seeking a ruling on the objections or to compel production of the information, the Plaintiff moved to strike the expert as a witness and the trial court granted the motion.

The Fifth District granted certiorari noting that striking this witness was too drastic a sanction. They added that before trial courts struck an expert witness, the trial court should at least find that someone was in contempt of court or had violated an appropriate court order. In this case, there was nothing to suggest that anyone disregarded a court order or impeded the administration of justice.

Quest Diagnostics, Inc. v. Rapio, 54 So. 3d 545 (Fla. 3d DCA 2011)

Quest mixed up a tissue sample (which later proved to be malignant) with a sample taken from another individual (which was not malignant). The Plaintiff sought discovery including the names of the other patient (with the non-malignant tissue), as well as, the identity of that patient's doctors. Quest objected to producing the information on relevancy grounds and based upon the fact that the information was privileged. The trial court sustained the objection as to the identity of the patients, but ordered Quest to provide the names of the other healthcare providers who treated that patient.

The Third District denied certiorari as to the portion of the trial court order that required production of the medical records of the other patient while redacting the other patient's identity. They granted certiorari as to that portion of the order requiring production of the names of the other healthcare providers because the disclosure was not only irrelevant, but would also lead to the identity of the other patient.

State Farm v. H Rehab, Inc., 56 So. 3d 55 (Fla. 3d DCA 2011)

The circuit court, sitting in its appellant capacity, violated clearly established principals of law by affirming a trial court's order granting a Motion to Compel the opposing party to produce surveillance video prior to allowing the opposing party to depose the subject of the video.

General Star Indemnity Company v. Atlantic Hospitality Florida, LLC, 57 So. 3d 238 (Fla. 3d DCA 2011)

The insured obtained orders compelling two senior officers of the insurance company to appear for deposition in a windstorm insurance case. General Star had filed an affidavit establishing that these senior officers had no role in the investigation or adjustment of the Plaintiff's claims. Accordingly, the Third District granted certiorari and quashed the order finding that if the president of the company had to give a deposition in all of the litigation matters involving his

company, he would never be able to manage the company and simply would be flying around the country giving depositions.

Miami-Dade County v. Rodriguez, 67 So. 3d 1213 (Fla. 3d DCA 2011)

Where a trial court denies a Motion to Dismiss or denies a Motion for Summary Judgment where the sovereign argues that it is not liable because no legal duty can be demonstrated, the appellate court will not review this matter pursuant to its certiorari jurisdiction. Where, however, the denial of the Motion to Dismiss or the denial of the Motion for Summary Judgment is based on sovereign immunity; the court will continue to exercise its certiorari jurisdiction.

Royal Caribbean Cruises, Ltd. v. Eidissen, 69 So. 3d 1019 (Fla. 3d DCA 2011)

The trial court granted Plaintiff's Motion to Amend the Complaint to add a claim for punitive damages. The court stated "while we agree that the evidence adduced and proffered is legally insufficient to support a punitive damages claim, we deny the petition as we are without jurisdiction to address this determination on the merits." The Third District Court of Appeal noted that certiorari is appropriate to determine whether the procedural requirements of Florida Statute 768.72 is complied with; however, certiorari is not appropriate to determine the sufficiency of the evidence for the punitive damage claim.

Racetrac Petroleum, Inc. v. Cooper, 69 So. 3d 1077 (Fla. 5th DCA 2011)

Plaintiff scheduled the deposition of Racetrac's former Risk Manager. In advance of her deposition, they obtained an order directing Racetrac to produce its claim file at the deposition for the ostensible purpose of refreshing the memory of the Risk Manager. The Plaintiff conceded that the contents of the claim file were immune from discovery as work product for purposes of the certiorari proceeding. The Plaintiff further conceded that only the Risk Manager would view the file and that no waiver of any privilege would result from the production of the file for the limited purpose. The Fifth District noted that a theoretical case could be made for the production of work product to refresh a witness' memory when the evidence was not otherwise available, but found the Plaintiff's showing to be mere conjecture at this point. Thus, the Fifth District quashed the order and granted certiorari.

Fifth Third Bank v. ACA Plus, Inc., et al., 73 So. 3d 850 (Fla. 5th DCA 2011)

ACA served Requests for Production to Fifth Third Bank. The bank timely objected to the Requests for Production. Issues arose pertaining to the production of agreed upon documents. The trial court ordered the bank to deliver certain documents to ACA and further ordered that a privilege log be filed as to other documents. The trial court found that one document constituted work product and another was a privileged attorney-client communication. Nonetheless, the trial court ruled that the privilege log was untimely filed and that any objections had been waived, including those based upon privilege.

On appeal, it was held that the trial court's finding of waiver was erroneous because Fla.R.Civ.P. 1.280(b)5 does not set forth a time in which a privilege log must be filed. Here, the privilege log was filed in accordance with the trial court's order and was done prior to in camera review of the documents and was therefore timely. The attorney-client privilege and work product immunity are important protections in the adversarial legal system. Implicit waiver of these protections should not be favored and should only be resorted to when a discovery violation is serious.

Teachers Insurance Company v. Loeb, 75 So. 3d 355 (Fla. 1st DCA 2011)

The First District granted in part and denied in part a Petition for Writ of Certiorari based upon a finding ruling that the trial court departed from the essential requirements of law when it held that a corporate representative of an insurance company waived the attorney/client privilege with regard to the basis of its withdrawal of certain affirmative defenses in the bad faith action. The Court upheld the protection of the attorney/client privilege by finding that a waiver does not occur when a party's representative testifies that he generally spoke about the subject matter or defenses in the litigation, but does not communicate any details of such communications. Moreover, it was important to note that the "advice of counsel" defense was not raised in this case and, thus, the communications between the insurance company representative and its attorney was irrelevant to the central issues in the case.

Notwithstanding, the Court did find a partial waiver of the attorney/client privilege occurred when the corporate representative testified about certain checks it issued to a construction company and, therefore, the Plaintiff's policyholders were entitled to further question the corporate representative about the insurance company's payment history and communications with that construction company.

Civil Procedure – Depositions

State Farm Mutual Automobile Insurance Company v. Dinner, 72 So. 3d 783 (Fla. 4th DCA 2011)

An adjuster who resided and worked in Hillsborough County and who had not been designated as a corporate representative to attend a deposition was compelled by a Broward circuit court to attend a deposition in Broward County. While the Fourth District found that the trial court's order was in error, they found no miscarriage of justice and therefore denied this second tier certiorari petition.

Fifth Amendment

Urbanek v. Urbanek, 50 So. 3d 1246 (Fla. 4th DCA 2011)

The Fourth District granted certiorari of a trial court order which compelled a party to answer interrogatories surrounding the details of a tape recorded conversation including the details surrounding the decision to tape the conversation; the taping itself; the equipment used; whether the tape was altered or edited. The Fourth District rejected the claim that the 5th Amendment privilege had been waived by the petitioner acknowledging that the conversation at issue was tape recorded.

Lang v. Bush, 51 So. 3d 1254 (Fla. 5th DCA 2011)

Where a witness had no reasonable apprehension of criminal prosecution because federal statutes were inapplicable to the offense and the statute of limitations had run on the applicable state crime, the trial court properly denied the witnesses' Motion for Protective Order based on the Fifth Amendment.

Financial Bias of Treating Physicians

Katzman v. Rediron Fabrication, 76 So. 3d 1060 (Fla. 4th DCA 2011)

It was not an abuse of discretion to deny a Motion for Protective Order filed by a physician to whom the Plaintiffs were referred by their lawyer for treatment following an automobile accident and who entered into a letter of protection agreement, agreeing to be paid for treating the Plaintiffs from any recovery obtained in the lawsuit. Because the physician qualified as an expert witness who

is expected to give expert opinion testimony in the case and was also a treating physician who had agreed to treat the patient under a letter of protection agreement, the physician was a "hybrid witness". As such, discovery was not limited strictly by the rule that governs discovery from typical experts retained to provide opinions at trial.

The discovery served upon the hybrid witness who is relevant to the discrete issue of whether the expert had recommended an allegedly unnecessary and costly procedure with greater frequency in litigation cases versus non-litigation cases and whether the expert, as a treating physician, allegedly overcharged for medical services at issue.

Case law was not intended to shield discovery of such relevant information and the language of the procedural rule codifying the methodology that balances a parties need to obtain financial bias discovery from an expert with the need to protect the expert's privacy interests indicates that a trial court retains flexibility and discretion to permit further discovery by other means when such situation requires.

Law of the Case

Suffolk Construction Company, Inc. v. First Sealord Surety, Inc., 63 So. 3d 18 (Fla. 3d DCA 2011)

The appellate doctrine "law of the case" applied to preclude a construction company from once again appealing entitlement of a surety to obtain attorney's fees against it. The Third District noted that when an appellate court decides a question of law, the decision of the court becomes law of the case and prevents reconsideration of all issues necessarily decided in a former appeal. In this case, *Suffolk Construction* had already lost an appeal reversing judgment in its behalf on the merits and granted the Surety's motion for entitlement for appellate fees. After the Florida Supreme Court denied review and issued an order granting the appellate attorney's fees to the Surety, the court determined the amount of the fees to be paid by the contractor to its subcontractor, Surety, which they again had tried to appeal. The only exception would be manifest injustice to award the appellate attorney's fees and in this case there was insufficient evidence to find such high standard was warranted reversal.

Mediation

In re: Amendments to Florida Rules of Civil Procedure 1.720, 36 FLW S627 (Fla. 11/3/11)

Unless otherwise permitted by court order or stipulated by the parties in writing, individuals who appear at the mediation must include a party representative having full authority to settle without further consultation. This means "the final decision maker with respect to all issues presented by the case [and] who has the legal capacity to execute a binding settlement agreement on behalf of the party."

Unless otherwise stipulated by the parties, 10 days prior to appearing at a mediation conference, each party shall file with the court and serve a written notice identifying the person or persons who will be attending the mediation conference is a party representative whereas an insurance carrier representative and confirming that those persons have final decision making abilities with the full authority to settle.

Motion to Dismiss for Lack of Prosecution

Turner v. Fia Card Services, 51 So. 3d 1242 (Fla. 3d DCA 2011)

No action has been undertaken on a case for 10 months. The trial court issued a Notice of Lack of Prosecution and set a hearing for February 5, 2010. The Plaintiff filed a showing of good cause on February 1, 2010 which was four days before the hearing. Rule 1.420(e) provides that the showing of good cause must be made "at least five days before the hearing." The Third District found that "five days meant five days" and reversed the case and ordered that it be dismissed.

Nastasi v. St. Joe Company, 65 So. 3d 121 (Fla. 1st DCA 2011)

After a 10-month period of inactivity, the trial court entered an order pursuant to Rule 1.420(e) advising the Plaintiffs that if no further record activity occurred within the next 60 days, the case would be dismissed for lack of prosecution. 16 days later, the Plaintiff's counsel filed a Motion to Withdraw as attorney of record and asked that the Plaintiffs be given a reasonable amount of time to obtain other counsel. No other filings were made during this time period and the trial court held a hearing at which time the court indicated that it would grant counsel's Motion to Withdraw, but the case would be dismissed. The First

District reversed and found that the Motion to Withdraw was filed within the 60-day time period thus precluding dismissal of the action. The court found that the filing was neither meaningless nor inconsequential to the case's progress.

Optimum Nutrition, Inc. v. Performance Trading Import& Export, 69 So. 3d 1055 (Fla. 3d DCA 2011)

The trial court issued a Notice of Lack of Prosecution on July 29, 2010. On September 28, 2010, the Plaintiff filed and served a Motion for Summary Judgment. The trial court dismissed the action finding that the Plaintiff failed to file anything of record during the 60-day window after its Notice of Lack of Prosecution. The Third District reversed finding that the 60-day window was subject to the 5-day service rule under Florida Rule of Civil Procedure 1.090. Thus, because the Notice of Lack of Prosecution was served by mail upon the Plaintiff, an additional 5 days had to be added to the safe-harbor, meaning that the period for conducting record activity did not actually expire until October 4, 2010.

Chemrock Corp. v. Tampa Electric Co., 71 So. 3d 786 (Fla. 2011)

The Supreme Court held that filings made by a Plaintiff during the 60-day grace period set forth under Rule 1.420(e) met the Rule's requirement for record activity thus precluding a dismissal for lack of prosecution.

Offer of Judgment/Proposal for Settlement

Tierra Holdings v. Mercantile Bank, 36 FLW D1049 (Fla. 1st DCA 5/18/11)

In this breach of contract action between a seller and a purchaser of two parcels of real estate, the contract contained a clause awarding the prevailing party attorney's fees and costs in any litigation arising out of the contract. The sale of real estate under the contract was conditioned on the buyer not reselling the land to a bank that would compete with the seller. During the course of litigation, the purchaser served a proposal for settlement in compliance with Florida Rule 1.442 and Fla. Stat. §768.79. The seller ultimately won the breach of contract lawsuit, however the amount awarded was at least 25% less than the proposal for settlement under the Florida Statute and, therefore, the court awarded the seller its attorney's fees and costs after subtracting the purchaser's entitlement to fees and costs as required under the Florida Statute, resulting in a net award to the seller plaintiff in the litigation. The purchaser defendant appealed arguing that the seller was not entitled to attorney's fees and costs after the date of the proposal for settlement was

served and, therefore, cut off its rights for an award of fees and costs because the defendant served the proposal for settlement that was ultimately successful under the statute.

The court disagreed and determined that there was nothing contained in the Florida Rules of Civil Procedure or Fla. Stat. §768.79 that supported the defendant, purchaser's, interpretation that the plaintiff's rights to recover the full amount of attorney's fees under the contract entered into as a prevailing party, was cut off by the date the proposal for settlement was served by the defendant which he ultimately prevailed on. Rather, the parties bargained in advance of litigation that all fees and costs would be awarded to the prevailing party, and there is nothing in the Florida Statutes that nullifies this expectation on the part of the two contracting parties to recover those expenses.

Nonetheless, it was appropriate for the trial judge to offset the plaintiff's award by the amount defendant incurred based on its rights to attorney's fees and costs by serving a the successful proposal for settlement that it prevailed on by the terms of the statute as a penalty to the plaintiff who did not accept it when it was served.

Gonzalez v. Claywell, 36 FLW D1784 (Fla. 1st DCA 8/15/11)

The Plaintiff filed a Proposal for Settlement offering to settle her lawsuit for $240,000 if the Defendant's insurance company, GEICO, tendered its check in that amount. The offer was not accepted and a total judgment was entered far in excess of this amount. The First District found that the Offer of Judgment was invalid and unenforceable.

Specifically, they found that it was invalid and unenforceable because it was impossible for the Defendant to meet the conditions of the Proposal. Specifically, the Proposal required that GEICO, a non-party, tender a check well in excess of its policy limits of $25,000 even though there had been no determination that GEICO was liable to pay more than its policy limits. Because the Proposal contained a condition that the Defendant could not possibly perform and divested him of "independent control of the decision to settle" it was invalid and unenforceable. At minimum, the First District noted that the Proposal was ambiguous because Gonzalez could not effectively evaluate the condition that GEICO tender the settlement check.

Arrowwood Indemnity Co. v. Acosta, 58 So. 3d 286 (Fla. 1st DCA 2011)

An insurer made a $1,000.00 offer of judgment which was rejected. Summary judgment was ultimately entered in favor of the insurer. The insurer then moved for fees under the offer of judgment statute. The evidence reflected that the insurer had made a $1,000.00 offer of judgment on a $10,000,000.00 insurance policy. The trial court concluded that, in consideration of the potential exposure under the policy and applying an objective standard, the $1,000.00 offer was not made in good faith and denied the request for fees.

On appeal, the trial court was reversed. It was held that in the context of a nominal offer of judgment, where the offeror has a reasonable basis to believe that exposure to liability is minimal, the offer is appropriate. Whether there was a reasonable basis to support the offer is properly determined by the subjective motivations and beliefs of the offerer. In making this determination, the trial court is not restricted to the testimony of the offerer, but also may properly consider objective evidence in addition to subjective factors. However, the court cannot rest its basis solely on the objective standards and must take into consideration the subjective factors as set forth by the offerer.

Schantz v. Sekine, 60 So. 3d 444 (Fla. 1st DCA 2011)

A settlement proposal which was conditioned on the Plaintiffs' joint acceptance was invalid even though the settlement offer apportioned the offered amount among the Plaintiffs and the Defendants. Although Rule 1.442 permits joint proposals if they break-out terms and amounts as to each party, a settlement offer conditioned on a joint acceptance is invalid. Therefore, while the amounts offered as between Plaintiffs and Defendants satisfied Rule 1.442, Florida Rules of Civil Procedure, requiring a joint acceptance as a condition of settlement violates the Rule.

Allstate Insurance Co. v. Staszower, 61 So. 3d 1245 (Fla. 4th DCA 2011)

Allstate was joined as an uninsured motorist carrier. The verdict did not exceed the tortfeasor's primary liability limits. As such, the uninsured motorist insurer was the prevailing party and was entitled to its taxable costs. Additionally, the Fourth District found that the trial court erred in denying the insurer's Motion for Attorney's Fees made pursuant to Florida Statute §768.79 where Allstate made a good faith Proposal for Settlement in the amount of $100. At the time Allstate filed the Proposal; they had an IME report from a doctor that said that the Plaintiff

had no permanent injury and needed no surgery. Thus, they could reasonably conclude that any resulting judgment would not exceed the underlying primary limits.

Patrick v. Gatien, 65 So. 3d 42 (Fla. 1st DCA 2011)

Where the Plaintiff purchased an automatic 90 day extension of the statute of limitations on March 21, 2006, prior to the time the limitations period would have otherwise expired on June 10, 2006, and the Defendant received Plaintiff's Notice of Intent to Initiate Litigation on August 2, 2006, the statute of limitations period began to run again 90 days later on November 1, 2006. Because immediately after the tolling period, 37 days of the 90 day extension had remained, and the remainder of the period of the statute of limitations was less than 60 days, the Plaintiff had 60 days from November 1, 2006 within which to file her Complaint. The Complaint, which was ultimately filed on January 17, 2007, was 70 days after November 1, 2006, was untimely and summary judgment was therefore properly granted on the statue of limitations.

Andrews v. Frey, 66 So. 3d 376 (Fla. 5th DCA 2011)

The Plaintiff and her minor daughter filed suit against Shannon Frey and Rudolph Frey, her father, for injuries suffered in an accident. Prior to trial, Shannon Frey served separate Proposals for Settlement on the Plaintiffs. The Proposals were essentially identical except for the name of the Offeree and the amount being offered. Each Proposal identified Shannon Frey as the Offeror and required the execution of a full release releasing the Defendants, Shannon Frey and Rudolph Frey and their insurers with regard to any and all claims brought as a result of the Complaint. The offers were not accepted and the Plaintiffs obtained far less than the 75% of the Proposal, thus subjecting them to sanctions. The Fifth District found that the Proposals were not ambiguous as to whether this was a joint offer because the Proposal clearly was filed with Shannon Frey as the sole Offeror. They also found that the Proposals were not jointly made and, therefore, they did not need to proportion the amounts between the two Defendants. Further, each Offeree had independent control as to whether they decided to settle the claims. The Fifth District determined that, because the issues of negligence and vicarious liability were not disputed and because the Plaintiffs did not assert a claim that would have imposed separate liability on Rudolph Frey and because any damages awarded would have been equally collectible from Shannon or Rudolph Frey, the Proposal was appropriate.

Mix v. Adventist Health System, Inc., 67 So. 3d 289 (Fla. 5th DCA 2011)

The Fifth District found that a Proposal for Settlement which set forth that the Plaintiff was to execute a Release of All Claims as to the Defendant making the proposal without setting forth the contents of the release or attaching a copy of the proposed release was ambiguous and, therefore, invalidated the Proposal for Settlement.

Jones v. Publix Supermarkets, Inc., 68 So. 3d 422 (Fla. 4th DCA 2011)

The Plaintiff sued Publix for injuries suffered when a pole fell from the ceiling and struck him. The Proposal provided in part that "this Proposal for Settlement encompasses all damages and expenses associated with this claim even though these damages are expenses as to which collateral source payments have been made." It further provided that the Plaintiff "will execute a full Release of liability in favor of Publix Supermarkets, Inc., a Florida corporation and its affiliated insurance company, and a Stipulation for Voluntary Dismissal." No further summary of the Release was included nor was a copy of the proposed Release attached to the Proposal. The Plaintiff received a judgment well in excess of the Proposal. While the trial court noted that "everybody understands who is being released and who isn't", the court concluded that because the Release was neither summarized nor attached to the Proposal for Settlement, the Proposal was void. The Fourth District distinguished its earlier decisions in this regard and noted that, there were no other claims and no other potentially liable released parties. Therefore, under these facts and circumstances, the Release provisions were sufficiently clear and left no ambiguities so that the recipient could fully evaluate its terms and conditions. Nevertheless, they added that "it is the preferred practice to set forth the terms of a Release with particularity, either within the body of the Proposal or by attaching the form of the Release."

Premises Liability

Rocamonde v. Marshalls of MA, Inc., 56 So. 3d 863 (Fla. 3d DCA 2011)

The Third District reversed summary judgment entered in favor of Marshalls. In this case, the Plaintiff tripped over a clothing rack. The court acknowledged that the clothing rack was open and obvious; however, they still found that it was error to enter summary judgment for Marshalls on the grounds that the Defendant did not have a duty to warn against a condition that is patent

and obvious when there was a factual issue as to whether the protruding bottom portion of the rack, over which the Plaintiff tripped and fell, was open and obvious.

Privilege Log

Fifth Third Bank v. ACA Plus, Inc., et al., 73 So. 3d 850 (Fla. 5th DCA 2011)

ACA served Requests for Production to Fifth Third Bank. The bank timely objected to the Requests for Production. Issues arose pertaining to the production of agreed upon documents. The trial court ordered the bank to deliver certain documents to ACA and further ordered that a privilege log be filed as to other documents. The trial court found that one document constituted work product and another was a privileged attorney-client communication. Nonetheless, the trial court ruled that the privilege log was untimely filed and that any objections had been waived, including those based upon privilege.

On appeal, it was held that the trial court's finding of waiver was erroneous because Fla.R.Civ.P. 1.280(b)5 does not set forth a time in which a privilege log must be filed. Here, the privilege log was filed in accordance with the trial court's order and was done prior to in camera review of the documents and was therefore timely. The attorney-client privilege and work product immunity are important protections in the adversarial legal system. Implicit waiver of these protections should not be favored and should only be resorted to when a discovery violation is serious.

Punitive Damages

Royal Caribbean Cruises, Ltd. v. Eidissen, 69 So. 3d 1019 (Fla. 3d DCA 2011)

The trial court granted Plaintiff's Motion to Amend the Complaint to add a claim for punitive damages. The court stated "while we agree that the evidence adduced and proffered is legally insufficient to support a punitive damages claim, we deny the petition as we are without jurisdiction to address this determination on the merits." The Third District Court of Appeal noted that certiorari is appropriate to determine whether the procedural requirements of Florida Statute 768.72 is complied with; however, certiorari is not appropriate to determine the sufficiency of the evidence for the punitive damage claim.

Recusal

Tallahassee Memorial Healthcare, Inc. v. Alexander, 51 So. 3d 644 (Fla. 1st DCA 2011)

Defendant's Motion for Disqualification which was based upon comments by the trial judge at a hearing on Plaintiff's Motion for Sanctions that "she had faith' as long as my fingernail' that the Defendant had produced documents sought by the Plaintiff" was legally sufficient.

Remittitur

Adams v. Saavedra, 65 So. 3d 1185 (Fla. 4th DCA 2011)

Following a motor vehicle accident, the jury entered an award of $640,587.56. As part of the award, the Plaintiff was awarded $45,000 for future medical expenses and $575,000 in past and future pain and suffering. The Plaintiff acknowledged that the award of future medical expenses was too high and should be reduced to $17,000 and opposed any remittitur of the intangible damages. The court remitted the award of future medical expenses to $17,000 and also remitted the intangible damages award by 40%. An appeal was filed, following which the trial court was granted jurisdiction to articulate findings in support of the remittitur. In doing so, the trial court "spoke in general buzz words" which included "grossly excessive," "contrary to the manifest weight of the evidence," "shocks the judicial conscience," and "clearly demonstrates that the jury was unduly influenced by passion or prejudice." The motion filed by the Defendant contained virtually no facts to support those characterizations. Ultimately, the Fourth District Court found that neither the Motion for Remittitur nor defense counsel's argument of the post-hearings provided any factual support for the remittitur of the intangible damages.

Sanctions

Incarnacion v. Thomas, 36 FLW D2318 (Fla. 3d DCA 10/19/11)

The trial court dismissed third party complaint brought by Incarnacion because of her counsel's failure to appear at a case management conference. While the Third District noted that the decision to impose sanctions is discretionary, "the imposition of sanctions requires wrong doing by the party being sanctioned, and the sanction must be commensurate with the offense." This is particularly true

here where it was not shown that the Defendant/Third Party Plaintiff was in any way responsible for her attorney's non-compliance.

Heathrow Master Association v. Zulia, 52 So. 3d 811 (Fla. 5th DCA 2011)

The Plaintiff contended that she suffered from RSD as a result of a fall. The Defendant retained a pain management specialist and, thereafter the Plaintiff sought information from the Defendant regarding the number of times that the expert had testified for the defense; the identity of the actions in which the expert had appeared as a witness or gave a deposition in the last three years; and the total amount of money that the expert was paid in those cases. The Defendant complied in part and objected in part claiming that the discovery was inappropriate. Rather than seeking a ruling on the objections or to compel production of the information, the Plaintiff moved to strike the expert as a witness and the trial court granted the motion.

The Fifth District granted certiorari noting that striking this witness was too drastic a sanction. They added that before trial court struck an expert witness, the trial court should at least find that someone was in contempt of court or had violated an appropriate court order. In this case, there was nothing to suggest that anyone disregarded a court order or impeded the administration of justice.

Cossio v. Arrando, 53 So. 3d 1141 (Fla. 3d DCA 2011)

The trial court sanctioned a party and prevented the party from calling any witnesses other than herself and precluded her from introducing any exhibits into evidence as a sanction for her attorney's failure to timely file a pretrial catalogue. The Third District reversed finding that there was no showing that the party was in any way responsible for her attorney's non-compliance and the sanction was not commensurate with the wrongdoing.

Wood v. Haack, 54 So. 3d 1082 (Fla. 4th DCA 2011)

The Defendant filed a Motion for Sanctions under Florida Statute 57.105 at the time that a Third Amended Complaint was pending. The motion stated that the case was filed without merit at its inception. The Fourth District held that the trial court erred in limiting attorney's fees to the date of service of the Third Amended Complaint. They also held that it was in error to award attorney's fees for the time incurred in litigating the amount of fees to be awarded.

Ferere v. Shure, 65 So. 3d 1141 (Fla. 4th DCA 2011)

During jury selection, the Plaintiff's counsel brought out for the first time, a suggestion that the Defendant's medical records had been changed or otherwise altered. The Defendant moved for mistrial and the trial court granted same. The Defendant then asked for attorney's fees and costs to be awarded pursuant to Florida Statute 57.105(1). The Plaintiff's counsel argued that there were discrepancies in the medical records to substantiate these claims; however, the trial court then entered an order granting the Defendant's Motion for Attorney's Fees and Costs noting that it found no allegations of "falsification of records" or "removal of records" in the complaint or the pre-trial stipulation and that the only issue which the Plaintiff's counsel brought out in discovery was what the court characterized as a "he said/she said factual dispute." The court further found that "raising such detrimental claims for the first time in voir dire with no proof, no handwriting expert, nothing more than "he said/she said" testimony after the parties have litigated the cases for 4 years was improper and fell within the court's authority … to award attorney's fees." The Fourth District reversed and found that Florida Statute 57.105(1) was inapplicable because it is conditioned upon a motion filed by a party given the other side 21 days to withdraw the claim. Second, they found that it was impossible for the Plaintiff to allege fraud or spoiliation in the Complaint because what the Plaintiff's counsel was alleging was not a fraud on the Plaintiff, but a fraud on the court. Lastly, the Fourth District determined that Florida Statute 57.105 only allows for an award of attorney's fees, but does not apply to an award of costs.

Bennett v. St. Mary's Medical Center, et al., 67 So. 3d 422 (Fla. 4th DCA 2011)

This case involved the alleged failure to timely diagnose and treat meningitis and negligently prescribing a contraindicated antibiotic causing permanent and significant injury to the Plaintiff. During the first 10 months of the case, the Plaintiff's attorney dutifully scheduled and attended depositions, responded to written discovery and served witness and exhibit lists. However, counsel later stopped complying with discovery requests and court orders compelling discovery, attending depositions, status conferences and hearing on Motions for Sanctions.

When counsel failed to appear at a mandatory status conference, the trial court announced it would enter a Show Cause Order as to why the case should not be dismissed. After explanation by counsel at the show cause hearing, the trial court declined to enter sanctions, but ordered the Plaintiff to comply with all outstanding discovery requests. Counsel failed to do so and failed to appear for a

second status conference and a pretrial conference. St. Mary's moved to compel the Plaintiff to respond to the discovery and the court rescheduled the pretrial conference. The court advised that the failure to appear would result in striking of the pleadings. The attorney failed to appear and the court entered an order dismissing the case with prejudice at to St. Mary's.

On appeal, it was held that it was error for the trial court to dismiss claims against two defendants as sanctions for Plaintiff's discovery violations without the trial court making express findings as to each of the factors delineated in *Kozel v. Ostenorf*. It was not, however, an abuse of discretion to deny a Motion for Relief from Summary Judgment entered in favor of two other Defendants after determining that the Plaintiff failed to demonstrate entitlement to relief under Rule 1.540(b)1.

Setting Matters for Trial

Parkinson v. Kia Motors Corp., 54 So. 3d 604 (Fla. 5th DCA 2011)

When a case is at issue, the trial court is obliged to schedule a case for trial upon request by either party notwithstanding pending motions for summary judgment.

Sovereign Immunity

Brown v. The City of Vero Beach, 64 So. 3d 172 (Fla. 4th DCA 2011)

The trial court properly dismissed with prejudice a Complaint filed against a city and county board of commissioners by the parents of child who was caught in an ocean rip current off a public park and who alleged that the city and county board breached its duty to warn the public of a dangerous condition in the ocean. F.S. 380.0276(6) exempts local government entities for injury where loss of life is caused by the changing surf and other naturally occurring conditions along coastal areas and creates a limitation of liability for local government due to the death and injuries resulting from rip currents. The statute was unambiguous and provided that government entities may not be held liable for death or injuries due to changes in surf or other naturally occurring condition along the coast, whether or not warning signs are displayed. Here, the allegations of the Complaint fell squarely within the statute's provision for governmental immunity and thus dismissal of the Complaint with prejudice was appropriate.

Subsequent Tortfeasors

Tucker v. Korpita, 36 FLW D2494 (Fla. 4th DCA 11/16/11)

Where there was testimony by the Defendant's expert that the treatment provided to the Plaintiff following a motor vehicle accident was inappropriate and could have accelerated the degenerative process in the Plaintiff, the trial court erred in failing to give a requested instruction on intervening cause.

Here, the specific testimony went beyond questioning the medical advisability of treatment advocated by the Plaintiff's expert, or questioning the wisdom of the diagnosis, prognosis or causal relationship between the purported injuries and the alleged incident. Instead, the Defendant's experts concluded that the treatment utilized by the Plaintiff's experts would make things worse or could make things worse clinically. While the former scenario may not generally require an intervening cause instruction, the latter situation, like in this case, should result in the instruction being given as requested.

The law is well settled that the initial tortfeasor may also be held liable for subsequent injuries caused by the negligence of healthcare providers. As stated by the Florida Supreme Court in *Stuart v. Hertz*, where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of incompetent physician or surgeon, and in following his advise and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake, or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds the original tortfeasor liable therefore.

Summary Judgment

Dickey v. Kitroser, 53 So. 3d 1182 (Fla. 4th DCA 2011)

This action arose out of a motor vehicle accident in which a commercial truck struck a car resulting in the car driver's death. One of the claims was against Bob's Barricades who provided barricades for traffic control. It was alleged that Bob's Barricades breached its duty of care by failing to block access points on the roadway where the accident occurred.

The co-Defendant truck driver and his employer filed a response to the co-Defendant's Motion for Summary Judgment requesting that the trial court defer ruling until discovery was complete. The co-Defendants argued that, allowing the hearing to go forward before discovery was completed would preclude them from naming Bob's Barricades as a *Fabre* defendant. The trial court denied the motion stating that the co-Defendant truck company and driver had no standing to oppose the summary judgment.

On appeal, the trial court's entry of summary judgment was reversed. The appellate court noted that a Defendant has standing to oppose a co-Defendant's Motion for Summary Judgment even though the Defendant has not asserted a claim against the co-Defendant. This rationale is the ability to preserve the right to add the moving co-Defendant as a *Fabre* defendant; a right that would be lost if the co-Defendant obtained summary judgment.

Rocamonde v. Marshalls of MA, Inc., 56 So. 3d 863 (Fla. 3d DCA 2011)

The Third District reversed summary judgment entered in favor of Marshalls. In this case, the Plaintiff tripped over a clothing rack. The court acknowledged that the clothing rack was open and obvious; however, they still found that it was error to enter summary judgment for Marshalls on the grounds that the Defendant did not have a duty to warn against a condition that is patent and obvious when there was a factual issue as to whether the protruding bottom portion of the rack, over which the Plaintiff tripped and fell, was open and obvious.

Le v. Lighthouse Associates, Inc., 57 So. 3d 283 (Fla. 4th DCA 2011)

The trial court improperly granted summary judgment on the Plaintiff's claim that her son was injured as a result of being exposed to unsanitary conditions while swimming in a community pool. The Fourth District reversed because the Defendant's motion essentially asked the court to make a determination that the Plaintiffs could not prove their cause of action. In fact, the trial court noted that "Plaintiff's claims are based on stacking of inferences upon inferences. It would not have been enough factual evidence to go to the jury." While the appellate court noted that this finding might be appropriate for a Motion for Directed Verdict, by granting the summary judgment, the trial court impermissibly shifted the burden to prove his entire case before trial.

Webster v. Martin Memorial Medical Center, 57 So. 3d 896 (Fla. 4th DCA 2011)

The Fourth District reversed a summary judgment granted in favor of a hospital in a medical malpractice action. In granting the summary judgment, the trial court noted that the Plaintiff had established "a mere possibility of causation" which was insufficient and because the Plaintiff had failed to produce "factual support" or "any evidence on the element of causation." The Fourth District emphasized that, at the time of trial, the Plaintiff has the burden of proving not only the acts of negligence, but their casual relationship with the injury alleged and that, unless the record to be considered on motion for summary judgment shows a complete absence of such a causal relationship, the Plaintiff who is opposing the motion is under no obligation to put in evidence showing such causal relationship."

Slaats v. Sandy Lane Residential, LLC, 59 So. 3d 320 (Fla. 3D DCA 2011)

The Plaintiff sued the Defendants for injuries sustained as the result of a fall while exiting a hotel pool area. The Plaintiffs claim the fall was caused by a step-down which created a dangerous condition. The Defendants moved for summary judgment arguing that the step-down was an open and obvious condition. In opposition, the Plaintiffs filed the affidavit of an expert stating that the step-down presented a unique, special hazard. Summary judgment was granted by the trial court and the Plaintiff appealed.

On appeal, the appellate court ruled that genuine issues of material fact precluded summary judgment. The Plaintiff had testified that she was unable to see the step-down because it was uniform in color and the afternoon sun was shining in her eyes. Moreover, the Plaintiff's architectural expert affidavit stated that the step-down presented a unique, special hazard because it was hidden and unexpected. These factual disputes were sufficient to preclude the entry of summary judgment.

Surveillance

State Farm vs. H Rehab, Inc., 56 So. 3d 55 (Fla. 3d DCA 2011)

The Third District granted certiorari and quashed the trial court's order which precluded State Farm from deposing the Plaintiff and the insured (subjects of video surveillance) prior to production of the video.

Taxable Costs

Lewis v. Thunderbird Manor, Inc., 60 So. 3d 1182 (Fla. 2d DCA 2011)

Copies and postage are part of the attorney's non-recoverable office expenses and generally are not taxable. Copies are taxable if the documents are filed with the court and are reasonably necessary to assist the court in reaching a conclusion, as well as, "cost of copies obtained in discovery."

Work Product

Universal City Development Partners, Ltd. v. Pupillo, 54 So. 3d 612 (Fla. 5th DCA 2011)

This was a battery claim brought by Mr. Pupillo against several defendants. It was alleged that, while watching a parade at Universal Studios, a police officer working a private security detail pushed the Plaintiff against a barricade, choked him and forced him to the ground. In the course of discovery, the Plaintiff requested incident reports regarding the subject incident, as well as, any incident for a three year period prior to the date of incident concerning similar incidents. The Defendant objected on grounds of work product.

The Plaintiff argued that the incident reports were privileged but that he was entitled to the reports because, based upon his own investigation, he had discovered that the police officer had committed battery on another patron six days before the subject incident. The Plaintiff argued that the reports were relevant to his claim and furthermore, that he was unable to obtain substantially equivalent material without undue hardship. The trial court agreed and ordered Universal to produce the reports.

On appeal, the trial court was reversed and Defendant's work product objection was ordered to be sustained. The Court noted that the work product doctrine is designed so as to not allow one party to prepare his own case through the investigative work of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures. Here, despite his claim to the contrary, the Plaintiff was able to use the ordinary tools of discovery to learn facts of the incident that he was involved in, as well as, facts of prior incidents. This could be accomplished through Interrogatories, Requests for Production and depositions. The Court held that the incident reports themselves were privileged although the facts about which they pertain were not.

"The fact that the incident report might yield additional information about the incident is not enough, without more, to show undue hardship."

Racetrac Petroleum, Inc. v. Cooper, 69 So. 3d 1077 (Fla. 5th DCA 2011)

Plaintiff scheduled the deposition of Racetrac's former Risk Manager. In advance of her deposition, they obtained an order directing Racetrac to produce its claim file at the deposition for the ostensible purpose of refreshing the memory of the Risk Manager. The Plaintiff conceded that the contents of the claim file were immune from discovery as work product for purposes of the certiorari proceeding. The Plaintiff further conceded that only the Risk Manager would view the file and that no waiver of any privilege would result from the production of the file for the limited purpose. The Fifth District noted that a theoretical case could be made for the production of work product to refresh a witness' memory when the evidence was not otherwise available, but found the Plaintiff's showing to be mere conjecture at this point. Thus, the Fifth District quashed the order and granted certiorari.

Worker's Compensation

Pensacola Christian College v. Bruhn, 37 FLW D64 (Fla. 1st DCA 12/30/11)

This was an action against a college for an injury sustained by a student when the bicycle she was riding on the college campus, while returning to work at a bookstore after her lunch break, collided with a van owned by the college and driven by the co-defendant who was a student employee of the college.

On appeal, it was determined that the trial court erred in determining that the defendant college was not the Plaintiff's employer and that her injury was not sustained in the course and scope of her employment where the Plaintiff had entered into an hourly work contract with college; the contract provided that the student would work where needed and; the Plaintiff was assigned to work at the bookstore, an affiliate of a local college located on the college campus; and, the college had secured workers compensation coverage for both itself and its affiliate bookstore. The trial court also erred in ruling that even if the college where the Plaintiff's employer, the injury did not occur in the course and scope of her employment because she was not injured on the employer's actual premises. Because the Plaintiff was on the employer's premises, returning to work after lunch, she was within the course and scope of her employment at the time of her injury and worker's compensation was her exclusive remedy.

Wrongful Death

Ruble v. Rinker Material Corporation, et al., 39 So. 3d 137 (Fla. 3d DCA 2011)

An action for personal injuries is abated or extinguished upon the death of the Plaintiff. When a personal injury to the decedent results in death, no action for personal injury shall survive and any such action pending at the time of death shall abate. An original Complaint for personal injury cannot be amended upon the Plaintiff's death to include a new wrongful death claim because Florida Law establishes that a personal injury claim is extinguished upon the death of the Plaintiff. Any surviving claim must be brought as a new and separate wrongful death action; it cannot be brought as an amendment to a previously existing injury action.

Wrongful Death – Attorney's Fees

Wagner, Vaughan Mclaughlin & Brennan, P.A. v. The Kennedy Law Group, 64 So. 3d 1187 (Fla. 2011)

The Wrongful Death Act, §768.26, Florida Statutes, sets forth attorney's fees as applicable where a wrongful death claim is settled before suit is filed. Where counsel for the personal representative cannot represent a survivor because of a conflict of interest, said counsel is not entitled to a fee on that survivor's portion of the recovery. A survivor creates a competing claim when he or she chooses to be represented by separate counsel. When survivors have competing claims and are represented by separate attorneys, attorney's fees from the wrongful death suit should be awarded in a manner commensurate with the attorney's work, providing for the proportional payment of attorney's fees by all survivors out of their respective awards. Where it is unclear what part the attorneys for each survivor played in securing the overall settlement, and there is no record evidence that the attorneys for the survivors secured any increase in the settlement recovery for the survivors, the personal representative's attorney should be compensated out of the total settlement proceeds, reduced by the amount necessary to have reasonably compensated the survivors attorneys for the work they performed in representing the survivors.