2013
CASE LAW SUMMARY

Procedural and Legal Issues

Additur

Pugliese v. Terek, 117 So. 3d 1230 (Fla. 3d DCA 2013)

At trial, Defendants did not contest liability for a 2004 automobile accident and did not contest that the Plaintiff's 2006 surgery was as a result of injuries received in that accident. The issues at trial were whether the medical costs for the 2006 surgery were reasonable and whether the surgery in 2009 was also the result of the 2004 accident and, if so, whether the medical expenses for that surgery were reasonable. After hearing evidence, the jury awarded $169,041.

On Plaintiff's post-trial Motion for Additur, the trial court granted the motion and awarded him the $341,981 he requested at the beginning of the trial. The Plaintiff rejected the additur and requested a new trial solely on the issue of damages which the trial court granted. The Order granting a new trial was unsupported by any fact or law or even a finding that the verdict was contrary to the manifest weight of the evidence.

The Third District noted that they would ordinarily relinquish jurisdiction and remand to the trial court to issue the orders to explain the rationale underlying the ruling however, in this case, the trial Judge (Judge Donner) was no longer available, was no longer on the bench, and belonged to a firm adverse to the defense counsel. The Third District further ordered that it was error to take away the jury verdict by granting a Motion for Additur, that the evidence at trial was conflicting and the jury could have reached its verdict in a manner consistent with the evidence. Based upon the trial record, they noted there was sufficient evidence by which the jury could have reasonably concluded that the 2009 surgery and related charges were not from the accident.

Bluth v. Blake, 128 So. 3d 242 (Fla. 4d DCA 2013)

It was error to grant motion for additur and nominal damages in legal malpractice claim where jury awarded zero damages and there were no evidence that the legal malpractice caused any damages. The legal malpractice suit stemmed from an attorney's representation of a developer in a breach of contract suit. The

developer claimed the attorney had a conflict of interest, which he failed to obtain the developer's consent to waive. Reviewing the trial court's orders *de novo*, the Fourth District held the orders granting additur and new trial on damages erred in four respects:

1) neither the motion for additur, the order granting additur, nor the record, reflected any of the criteria which would justify granting additur; 2) the jury's zero dollar award was justified where the developers failed to present any evidence of damages from the legal malpractice and the developers did not argue any such damages in closing; 3) the trial court suggested that nominal damages are not recoverable in a legal malpractice claim as the claim does not accrue until redressable harm occurs; and 4) the developers waived entitlement to nominal damages because they did not request a jury instruction or request nominal damages in closing.

Appeals

GEICO General Insurance Company v. Williams, 111 So. 3d 240 (Fla. 4th DCA 2013)

The Plaintiffs brought a wrongful death suit arising out of a fatal car accident against Defendant driver and the driver's father, who owned the vehicle. Defendants were insured by GEICO and GEICO retained counsel to defend them in the lawsuit. The Defendant's policy provided liability coverage with limits of $25,000.00 per person and $50,000.00 per accident. The Plaintiff filed a Proposal for Settlement against the father/owner for $150,000.00. The Defendants requested that GEICO accept the proposal, but GEICO rejected and proceeded to trial. At trial, the jury returned a verdict against the father in the amount of $2,500,000.00. After reduction for the negligence of a Fabre Defendant, Final Judgment in the amount of $250,000.00 was entered against the Defendant in November of 2009. The judgment entered by the trial court expressly reserved jurisdiction to amend the judgment to include attorney's fees and costs.

The Plaintiff moved to tax attorney's fees, costs, and investigative expenses pursuant to the unaccepted Proposal for Settlement and as the prevailing party. In April, 2010, the court entered an Order finding Plaintiff was entitled to attorney's fees and costs. In January, 2011, the court entered a detailed order delineating the specific amount of attorney's fees and costs. Plaintiff filed a Motion for Entry of Judgment pursuant to the Order taxing attorney's fees and costs and to include GEICO on the forthcoming fees and cost judgment, as well as a Motion to Amend

the prior judgment to include GEICO on the forthcoming fees and cost judgment, as well as the Motion to Amend the prior judgment to include GEICO for the outstanding interest owed.

At the hearing on Plaintiff's motions, counsel for GEICO raised only one argument which was the Plaintiff failed to timely join GEICO as a party to the Final Judgment under both the non-joinder statute and Florida Rule of Civil Procedure 1.350, which states that a Motion to Amend a Judgment must be served no later than 10 days after the return of the verdict and the jury action. The court granted Plaintiff's motions and expressly rejected GEICO's "only argument that the motions to add GEICO to the judgments were untimely."

On August 2, 2011, GEICO filed a Motion for Rehearing/Reconsideration and argued for the first time that: (1) The language of the policy did not provide for payment of attorney's fees and (2) GEICO cannot be considered a "party" for the purposes of the Offer of Judgment statute. The Motion for Rehearing was never noticed for hearing and the trial court never ruled on the motion. GEICO then filed a Notice of Appeal addressing the same order. Six days later, the trial court entered an Amended Final Judgment which added GEICO as a party to the Final Judgment for purposes of attorney's fees, taxable costs, and interest owed. GEICO filed an Amended Notice of Appeal aimed at the Amended Final Judgment.

On appeal, the Fourth District found that GEICO's arguments which were raised in the Motion for Reconsideration were waived pursuant to Florida Rule of Appellate Procedure 9.020 because GEICO filed its Notice of Appeal prior to the Court ruling on its Motion for Rehearing/Reconsideration. Thus, the only argument which is preserved for appeal was the timeliness of Plaintiff's Motions.

As a matter of law, GEICO is considered a party for purposes of recovering taxable costs or attorney's fees which would be recoverable by the insured pursuant to §627.4136(2) Fla. Stat. (1991). Further, issues regarding attorney's fees are considered collateral to the main dispute and thus a judgment on the merits of the suit is final and appealable even if it reserves jurisdiction to later determine either parties entitlement to attorney's fees or the amount to be awarded. However, the attorney's fees issue is not finally resolved or ripe for appellate review until both entitlement and amount have been determined.

GEICO's calculations as to the timeliness were incorrect because the final judgment on the issues of attorney's fees was not entered until July, 2011, when the court made its determination as to entitlement and the amount of fees owed. Thus,

even if GEICO was not to be considered a party under the non-joinder statute, GEICO was timely added as a party to the Final Judgment regarding the attorney's fees and taxable costs because it was added "at the time when judgment on attorney's fees and taxable costs was entered."

Arbitration

Truck Ins. Exchange v. Pediatrix Medical Group, Inc., 121 So. 3d 50 (Fla. 4th DCA 2013)

Trial court erred in denying insurer's motion to compel arbitration where policy provided for arbitration of disputes or differences of opinion "arising with respect to interpretation of the policy or in the event of disagreement as to whether or not a particular settlement should be made." Where a contract contains an arbitration provision, there is a presumption in favor of arbitration and an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

Attorney-Client Privilege and Board of Directors

Rogan v. Oliver, 110 So. 3d 980 (Fla. 2d DCA 2013)

The former President of a condominium association sued the Defendants for defamation under various theories of liability. The Plaintiff claims that the Defendants made written and oral statements accusing him of abusing his position when he was President and using association funds for personal projects. The Plaintiff alleges that the statements were false and injurious to his reputation in the community. The Defendants raised the affirmative defense of truth.

During the Plaintiff's deposition, he testified that he relied upon the advice of the association's prior attorneys in determining whether certain actions taken by him and others on the association's Board of Directors were authorized and proper. The Defendant than sought to depose the attorneys about the advice that they gave the board members.

The Plaintiff objected and contended that the communications between the Board and the attorneys were protected by attorney client privilege and asserted that neither he nor the prior Board would waive that privilege. He also alleged that some of the communications were made to him in his individual capacity which

were also protected by the privilege. The trial court sustained the objections and the Defendants filed a Petition for Certiorari.

The Second District reversed the trial court's decision and noted that, "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney/client privilege passes as well…displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties." In other words, it is the current Board of Directors of the association which has the authority to waive or assert the attorney/client privilege as to communications between the association's prior Board and its counsel. The case was therefore remanded so that the trial court could make a determination whether the current Board waived the attorney/client privilege on behalf of the association.

Attorney's Fees—Alternative Fee Recovery Clause

First Baptist Church of Cape Coral v. Compass Construction, 115 So. 3d 978 (Fla. 2013)

Following a construction accident, First Baptist and Compass Construction were named defendants. First Baptist won against the Plaintiff and against Compass in a cross-claim for contractual indemnity. At dispute was the fee rate owed by Compass Construction to First Baptist. The fee agreement between First Baptist's insurer and its attorneys set forth a rate of $170 per hour and that the insurer's obligation to pay was not contingent in any respect. The agreement also contained language that should anyone other than the insurance company be required to pay the fees, the hourly rate would be $300 or an amount determined by the court, whichever was higher.

The Florida Supreme Court upheld the alternative fee recovery clause. Such an agreement does not violate the prohibition against a fee award that exceeds the fee agreement, because it establishes an agreed rate that the client must pay but also states that the court may award a higher reasonable attorney's fee if someone other than the client is required to pay. Thus, a higher fee award did not exceed Compass Construction's contractual indemnity obligation because First Baptist, through its insurer, was obligated to pay the higher amount under the fee agreement.

Attorney's Fees Following Non-Binding Arbitration

Saltzman v. Hadlock, 112 So. 3d 772 (Fla. 5th DCA 2013)

Before trial, the Court ordered non-binding arbitration hearing. At the hearing, the arbitrator found no negligence on the part of the Defendant doctor. Dissatisfied with the result of the arbitration, the Plaintiff requested a jury trial *de novo.* Following trial, the jury returned a verdict in favor of the Defendant and the trial court entered a final judgment in favor of the doctor. The Defendant doctor then filed a motion for attorney's fees pursuant to Florida Statute §44.103(6) which the trial court denied.

The Fifth District noted that, generally, a trial court's order on attorney's fees is reviewed for an abuse of discretion. However, when entitlement to attorney's fees is based on the interpretation of a statute, the Appellate Court's review is *de novo.* Additionally, because statutes awarding attorney's fees are in derogation of the common law rule requiring each party pay its own attorney's fees, these statutes are to be strictly construed.

The statute in question states that "the party having filed for a trial *de novo* may be assessed…reasonable costs to the party, including attorney's fees, … incurred after the arbitration hearing if the judgment upon the trial *de novo* is not more favorable than the arbitration decision." Because of the use of the permissive "may" the Fifth District noted that the legislature clearly vested the trial court with discretion to award or deny attorney's fees and, therefore, it was within the trial court's discretion to deny same.

Attorney's Fees-Motion Untimely

ASAP Services v. S.A. Florida International, 122 So. 3d 965 (Fla. 3d DCA 2013)

The Plaintiff obtained a Final Default Judgment against the Defendants. The Defendants filed a post-judgment motion to set aside the Final Default Judgment. More than 30 days after receiving the Final Default Judgment, the Plaintiff filed a Motion for Attorney's Fees and Costs. The Third District found that this Motion for Attorney's Fees and Costs was untimely under Rule 1.525 and that the post-judgment motion to set aside the Final Default Judgment did not toll the 30-day time requirement for serving the motion.

Attorney's Fees-Non Joinder

GEICO General Insurance Company v. Williams, 111 So. 3d 240 (Fla. 4th DCA 2013)

The Plaintiffs brought a wrongful death suit arising out of a fatal car accident against Defendant driver and the driver's father, who owned the vehicle. Defendants were insured by GEICO and GEICO retained counsel to defend them in the lawsuit. The Defendant's policy provided liability coverage with limits of $25,000.00 per person and $50,000.00 per accident. The Plaintiff filed a Proposal for Settlement against the father/owner for $150,000.00. The Defendants requested that GEICO accept the proposal, but GEICO rejected and proceeded to trial. At trial, the jury returned a verdict against the father in the amount of $2,500,000.00. After reduction for the negligence of a Fabre Defendant, Final Judgment in the amount of $250,000.00 was entered against the Defendant in November of 2009. The judgment entered by the trial court expressly reserved jurisdiction to amend the judgment to include attorney's fees and costs.

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On appeal, the Fourth District found that GEICO's arguments which were raised in the Motion for Reconsideration were waived pursuant to Florida Rule of Appellate Procedure 9.020 because GEICO filed its Notice of Appeal prior to the Court ruling on its Motion for Rehearing/Reconsideration. Thus, the only argument which is preserved for appeal was the timeliness of Plaintiff's Motions.

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GEICO's calculations as to the timeliness were incorrect because the final judgment on the issues of attorney's fees was not entered until July, 2011, when the court made its determination as to entitlement and the amount of fees owed. Thus, even if GEICO was not to be considered a party under the non-joinder statute, GEICO was timely added as a party to the Final Judgment regarding the attorney's

fees and taxable costs because it was added "at the time when judgment on attorney's fees and taxable costs was entered."

Bifurcation

Johansen v. Vuocolo, 125 So. 3d 197 (Fla. 4th DCA 2013)

Following a verdict in favor of the Defendants, the Plaintiff filed a Motion for New Trial arguing that the trial court erred in bifurcating her claims of medical malpractice and negligent hiring and retention of the primary surgeon from her claims of negligent hiring and retention of the assistant surgeon. The Fourth District affirmed, finding that the trial court did not abuse its discretion.

Dr. Vuocolo, a surgeon employed by the Heart & Family Institute surgically removed part of the decedent's lung. Dr. Norton, a general surgeon who was also employed by the Institute, assisted in the lobectomy and post-surgical care of the patient. The patient died as a result of post-operative complications. His estate filed a claim for medical malpractice against Dr. Vuocolo and a claim against the Institute for vicarious liability for his malpractice. They also filed a claim against the Institute for the negligent hiring and retention of this doctor.

After filing a Complaint and after the statute of limitations had run, the Estate discovered that Dr. Norton, the assistant surgeon, had an extensive history of medical malpractice (Dr. Norton had 12 prior medical malpractice claims, two which resulted in patient's deaths from excessive and uncontrolled bleeding). Although the statute of limitations prevented the estate from filing suit against Dr. Norton, the trial court ruled that the negligent hiring complained against the Institute was sufficiently pled so as to include any negligent acts Dr. Norton may have committed while caring for the patient.

Because Dr. Vuocolo was concerned that Dr. Norton's extensive malpractice history would have a prejudicial effect on the jury, Motions to Bifurcate the medical malpractice claims from the hiring and retention claims were filed. As a result, the trial court ruled that the malpractice and negligent hiring claim against Dr. Vuocolo would be tried separately from the claims based on the medical malpractice and negligent hiring of Dr. Norton.

Finding that the trial court did not abuse its discretion in this regard, the Fourth District affirmed noting that the bifurcation Order did not affect the Estate's ability to fully and fairly litigate its claims against Dr. Vuocolo and that, moreover,

the Estate could still proceed to trial on its claims against the Institute for the alleged negligent hiring and retention of Dr. Norton.

Causation

Menendez v. West Gables Rehab. Hosp., LLC, 123 So. 3d 1178 (Fla. 3d DCA 2013)

Menendez sued West Gables for injuries sustained while assisting with her mother's gait training with a therapist. As her mother began to fall, Menendez threw herself on the ground to cushion the fall. The complaint alleged violations of: duty to warn of a dangerous condition, failure to keep the premises in a reasonably safe condition, and the duty to perform the gait training in a reasonably safe manner. The trial court granted West Gables' motion for summary judgment.

On appeal, the Third District affirmed because the record evidence could not establish duty or proximate cause under either theory pled – premises liability or physical therapy malpractice, because her decision to cushion the fall was an intervening act. Menendez argued that the rescue doctrine applied because she acted reasonably under the circumstances. While this argument may have been successful to overcome summary judgment, it was neither pled nor argued to the trial court. Accordingly, the Third District could not address this argument on appeal.

Certiorari

Gulf Coast Surgery Ctr., Inc. v. Fisher and Penney, 107 So. 3d 493 (Fla. 2d DCA 2013)

Penney was involved in an auto accident with Fisher. Penney was then treated at Gulf Coast. Penney filed suit against Fisher, and Fisher served a subpoena duces tecum seeking various financial documents from Gulf Coast which related to Penney's care. Gulf Coast filed a motion for protective order. The trial court ordered Gulf Coast to comply with the discovery requests.

The Second District granted Gulf Coast's Petition for Certiorari. The trial court failed to balance Fisher's need for the documents with Gulf Coast's privacy interest. Further, because Gulf Coast contended that these documents contained trade secrets, the trial court was required to perform an in-camera review to

determine whether they were trade secrets. Moreover, when a court orders disclosure of trade secrets, it must take appropriate measures to protect the interests of the trade secret holder, the interest of the parties, and the furtherance of justice. *Rogan v. Oliver, 110 So. 3d 980 (Fla. 2d DCA 2013)*

The former President of a condominium association sued the Defendants for defamation under various theories of liability. The Plaintiff claims that the Defendants made written and oral statements accusing him of abusing his position when he was President and using association funds for personal projects. The Plaintiff alleges that the statements were false and injurious to his reputation in the community. The Defendants raised the affirmative defense of truth.

During the Plaintiff's deposition, he testified that he relied upon the advice of the association's prior attorneys in determining whether certain actions taken by him and others on the association's Board of Directors were authorized and proper. The Defendant than sought to depose the attorneys about the advice that they gave the board members.

The Plaintiff objected and contended that the communications between the Board and the attorneys were protected by attorney client privilege and asserted that neither he nor the prior Board would waive that privilege. He also alleged that some of the communications were made to him in his individual capacity which were also protected by the privilege. The trial court sustained the objections and the Defendants filed a Petition for Certiorari.

The Second District reversed the trial court's decision and noted that, "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney/client privilege passes as well…displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties." In other words, it is the current Board of Directors of the association which has the authority to waive or assert the attorney/client privilege as to communications between the association's prior Board and its counsel. The case was therefore remanded so that the trial court could make a determination whether the current Board waived the attorney/client privilege on behalf of the association.

Walker v. Ruot, 111 So. 3d 924 (Fla. 5th DCA 2013)

The Plaintiffs filed a negligence action for injuries sustained in a rear-end collision. They sued the driver, Paul Walker and his employer, Bright House Networks. The Plaintiff's requested Walker's personnel file and Bright House objected on the grounds that the file contained irrelevant information and production of the file would reveal Walker's confidential information and thus violate his privacy rights.

The Plaintiff filed a Motion to Compel and argued that the information in the personnel file was discoverable because it might support claims for negligent entrustment, negligent hiring, and/or negligent retention. They also argued that the information might aid them in locating Walker to effectuate service of process. Bright House again objected on relevancy grounds, but properly conceded that it lacked standing to assert Walker's privacy rights.

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Without conducting an in-camera inspection, the Court entered an Order compelling the production of the entire file. The Fifth District granted certiorari and noted that while Bright House lacked standing to assert Walker's privacy rights, it possessed standing to oppose a production of private information within the file on the grounds that the information was irrelevant. The Fifth District noted that because Walker had not yet been served and his whereabouts were unknown, he lacked the opportunity to personally assert a privacy objection.

They added that, when privacy rights are implicated, discovery should be narrowly tailored to provide access to discoverable information while safeguarding privacy rights. They added that the personnel file would likely contain information about his compensation, benefits, pension, etc., which would be irrelevant, but it might contain information regarding his training, competence, abilities and disciplinary history which might be relevant to the underlying negligence action and might also contain discoverable information which might be helpful in locating the driver.

D.L.J. Mortgage Capital, Inc. v. Fox, 112 So. 3d 644 (Fla. 4th DCA 2013)

The Respondent propounded a Request for Production in a mortgage foreclosure action. Four months after a response was due, the Petitioner objected and did not file a privilege log. The trial court ordered production of the documents finding that the Petitioner's failure to file the privilege log constituted a

waiver of privilege as to various items. The Fourth District reversed. Although they noted the trial court has discretion to find a waiver of privilege from the failure to file a privilege log, they ruled that the time for filing a privilege log was tolled until the trial court ruled on the Petitioner's objections regarding the scope of discovery. Further, the Petitioner did object to various discovery requests based on certain categories (work product and attorney/client privilege). As such, the Fourth District granted the Petition for Writ of Certiorari, ordered the Trial Court to rule on the non-privilege objections and then allow the Petitioner an opportunity to file a privilege log within a reasonable period of time thereafter.

D*an Euser Waterarchitecture, Inc. v. City of Miami Beach, 112 So. 3d 683 (Fla. 3d DCA 2013)*

Dan Euser Waterartechitecture, Inc. was a Defendant in a design and construction case involving a park renovation project. Euser is a Canadian corporation having its principle place of business in Ontario. Its corporate representative is a resident of Ontario and all of their documents and files related to the litigation are located in Ontario. Additionally, Euser was not seeking any affirmative relief.

Despite this, the Trial Court denied Euser's Motion for Protective Order and ordered that Euser's corporate representative appear for deposition in Miami-Dade County, Florida, as opposed to its headquarters in Ontario. The Third District granted certiorari and held that "a Defendant will not be required to travel a great distance and incur substantial expenses to be deposed by the Plaintiff, unless the Defendant is seeking affirmative relief. Thus, under Florida law, a non-resident corporate Defendant need not produce a non-resident corporate officer in Florida."

Cooper Tire and Rubber Company v. Guzman, 112 So. 3d 731 (Fla. 3d DCA 2013)

Cooper Tire petitioned for Writ of Certiorari to quash an Order compelling production of documents Cooper claimed were protected from discovery by the trade secret privilege. The Personal Representative sued Cooper for the negligent design and manufacture of its tires. Cooper objected to a number of discovery requests on grounds that the requested documents were protected by the trade secret privilege and filed those documents with the Court for an in-camera inspection. At the same time, Cooper filed a Motion for Protective Order of Confidentiality pertaining to the privileged documents.

At the hearing for the Motion for Protective Order and Guzman's respective Motion to Compel, the trial court ordered that all documents already produced by Cooper for *in camera* inspection were relevant, subject to discovery, and were to be produced. The court also granted Cooper's Motion for Protective Order finding that the documents the Court ordered produced shall be subject to the protection.

If a court orders production of a trade secret, it must first demonstrate the reasonable necessity of the production and set forth its findings on why reasonable necessity has been demonstrated. Applying this standard, the Third District granted Certiorari, quashed the Order compelling production of the documents and remanded with instructions to the trial court to follow this standard.

The Third District noted that, while the trial court limited the scope of the production of the trade secret documents by granting Cooper's Motion for Protective Order and authorized disclosure of the confidential materials only to persons in connection with the trial preparation in this case, it failed to set forth in its order the required findings as to why the production of such documents was reasonably necessary.

Poton v. Wiggins, 112 So. 3d 783 (Fla. 1st DCA 2013)

Defendant in an automobile negligence action sought writ of certiorari to quash the trial court's order overruling her objection to discovery of her medical records, specifically (1) pharmacy records for the one year period preceding the date of the accident; and (2) medical records from her treating physician from the date of the accident to the present. The First District dismissed the Petition with regard to the pharmacy records and granted with regard to the medical records.

Petitioner answered interrogatories and testified at her deposition to using prescription medications in the hours prior to the accident. The Petitioner objected to production of her pharmacy records as irrelevant, immaterial and an invasion of her privacy rights. The trial court overruled her objections, noting that while Petitioner did not have a bodily injury claim, the records were discoverable due to the existence of inconsistencies between the interrogatory responses and her deposition testimony. The trial court ordered the Petitioner to execute a release of her pre-accident pharmacy records and her post-accident records to her counsel, who upon receipt, could then move for protective order with respect to particular record asserted as privileged.

On appeal, the First District denied certiorari as to production of the pharmacy records. Petitioner's alleged irreparable harm was premature and speculative. The Petitioner could move for protective order and then ultimately appeal denial of the protective order.

The First District granted certiorari as to the post-accident medical records. The Petitioner did not put her post-accident medical condition at issue in the case. The records were not relevant to the issues in the case and the trial court erred in ordering these documents to be produced.

Magical Cruise Company Limited v. Turk, 114 So. 3d 233 (Fla. 5th DCA 2013)

The Defendant filed a Writ of Certiorari to Quash an Order requiring it to turn over work product to the Plaintiff. Because the Trial court made no findings justifying the production of the work product, the Fifth District granted the petition and quashed the Order.

Rodriguez v. Miami-Dade County, 117 So. 3d 400 (Fla. 2013)

Denial of a motion for summary judgment on the basis that a government entity is entitled to sovereign immunity is not reviewable by certiorari. Certiorari review is only available upon a showing of: 1) a departure from the essential requirements of the law, 2) resulting in material injury for the remainder of the case 3) that cannot be corrected on post-judgment appeal. The cost and expense of defending a lawsuit is not irreparable harm in the context of certiorari review.

Lantana Ins., Ltd., v. Thornton, 118 So. 3d 250 (Fla. 3d DCA 2013)

Certiorari review of an order denying motion to dismiss is appropriate when an insured demonstrates that the presuit requirements of 627.4136, Fla. Stat., have not been met. §627.4136(1) requires the person not insured to first obtain a settlement or verdict against the insured as a condition precedent to a third party cause of action against an insurer. Without a verdict against insured, the injured is without a beneficial interest in the policy and thus no cause of action against the insurer had accrued.

Publix Supermarkets v. Santos, 118 So. 3d 317 (Fla. 3d DCA 2013)

The Plaintiff filed suit against Publix for negligence alleging that she was an invitee at a specific Publix store located in Miami when she slipped and fell as a

result of "old wet spinach or some other transitory substance" at or near a kiosk located in the store. The kiosk was part of the Publix Aprons Program where Publix provides recipes and in-store cooking demonstrations to customers for the in-store sampling. Santos sought the discovery of all slip and falls at the specific store where she fell within the three years prior to her accident.

Publix served a response which showed that no prior incidents occurred at that store. The Plaintiff then requested that Publix produce all incident reports relative to any occurrence at kiosks located in Publix stores within the State of Florida. Publix objected and moved for a protective order contending that the burden of proof standard set forth in Florida Statute 768.0755 did not require it to produce the information. The trial court then directed Publix to supplement its response to an earlier interrogatory and provide information regarding prior incidents at all Publix stores in Florida within the past three years.

The Third District granted certiorari, finding that the trial order granted the Plaintiff "carte blanche" discovery to irrelevant information. In so doing, the Third District noted a change in the wording of the statute when the legislature repealed §768.0710 and enacted Florida Statute 768.0755. Specifically, the legislature focused on a particular "business establishment" where the slip and fall occurred and now an injured person must prove that the particular "business establishment" where the injury occurred had actual or constructive knowledge of the dangerous condition and, therefore, discovery should be restricted to information regarding that particular establishment.

Construction Systems of America, Inc. v. Travelers Ins. Co., 118 So. 3d 942 (Fla. 3d DCA 2013)

The attorney for Construction Systems reviewed various documents at the office of MK Contractors. These records were marked to be duplicated by a copy service and then forwarded to counsel. Nine months after the document inspection, counsel for MK Contractors realized that the binders contained privileged documents and filed a Motion to Compel return of the documents and a Motion to Disqualify Counsel for CSA.

These matters were referred to a special magistrate and after a lengthy evidentiary hearing, the Magistrate issued a report and recommendation finding the documents constituted fact work product, but concluded that MKC had waived the privilege and therefore, recommended denial of both motions. MKC filed exceptions to the report and the trial court rejected the recommendations and

granted the motions concluding that the privilege had not been waived and that the possibility that CSA had gained an unfair informational advantage from the disclosure required disqualification.

Exceptions to the Magistrate's report are to be reviewed by determining whether the factual findings and conclusions are supported by competent substantial evidence and to determine whether the Magistrate misconceived the legal effect of the evidence or whether the conclusions are clearly erroneous.

In this case, the Third District noted that there is a 5-factor relevant circumstances test to determine whether a party waived privilege through inadvertent disclosure: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure and the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) were there any delays and measures taken to rectify the disclosures; and (5) whether the overriding interest of justice would be served by relieving a party of its error.

The Third District found that the trial court was within its authority by accepting the facts as found by the Magistrate but determining that the Magistrate misconceived the legal effect of the evidence. As for the disqualification of counsel, the Third District granted certiorari. They noted that the movant must establish that "the inadvertently disclosed information is protected, either by privilege or confidentiality, and that there is a possibility that the receiving party has obtained an unfair informational advantage as a result of the inadvertent disclosure."

In this case, the trial court made creditability determinations based upon testimony presented to the Magistrate which the Third District found was error. Therefore, they granted certiorari and ordered that the matter be remanded to the Magistrate for further determination on the issue of disqualification.

State Farm Insurance Company v. Ulrich, 120 So. 3d 217 (Fla. 4th DCA 2013)

State Farm filed a Petition for Certiorari from orders that denied its Motion to Abate an insurance bad faith action and denied its Motion for Protective Order from bad faith discovery. State Farm argued that the respondents could not maintain their first-party bad faith action because State Farm invoked the appraisal provision of the insurance policy and paid the appraisal award. State Farm further maintained that it could not be liable in a statutory bad faith action unless there had been a determination that it breached the insurance contract.

Finally, State Farm contended that the civil remedy notice filed was defective because it was not specific enough. The Fourth District denied the petition finding that State Farm was not materially harmed and had an adequate remedy on appeal from a final order. They specifically held that an alleged deficiency in a civil remedy notice served by an insured is not reviewable by certiorari.

Miccosukee Tribe v. Lewis, 122 So. 3d 504 (Fla. 3d DCA 2013)

In this case, the trial court entered an order clarifying fact discovery deadlines on July 15, 2013. On July 23, 2013, the Petitioner filed a Motion for Reconsideration of the clarification order and the court denied the Motion for Reconsideration on July 25, 2013. On August 19, 2013, the Petitioner filed a Petition for Writ seeing review of the clarification order rendered July 15, 2013. The Respondent moved to dismiss the petition as being untimely.

The Third District granted the Motion to Dismiss noting that the Motion for Reconsideration was not an authorized motion and did not suspend rendition or toll the time for filing the petition. Nevertheless, the Petitioner argued that it was entitled to an additional five days to file the petition citing Florida Rule of Judicial Administration 2.514(b) which provides that "when a party may or must act within a specified time after service and services made by mail or e-mail, five days are added after the period that would otherwise expire under subdivision (a).

The Third District commented that the Petitioner misconstrued the rule noting that the additional five day time period applies when another rule requires a party to act within a specified time after service and that this rule affords no additional time when a party is required to act within a specified time after rendition of an order.

Allstate Ins. Co., v. Total Rehab & Med. Ctrs., Inc., 123 So. 3d 1162 (Fla. 4th DCA 2013)

Allstate and other insurers filed suit seeking monetary damages from Total Rehab and other medical centers. Two attorneys working for Allstate created a master summary chart to be used as a trial exhibit which consisted of a combination of personal injury protection files generated by Allstate, and medical and billing charts generated by Total Rehab. The chart was introduced into evidence as a summary based on Section 90.956, Fla. Stat. The trial was declared a mistrial for other reasons.

Before retrying the case, Total Rehab sought to take the depositions of the attorneys who created the master summary chart. The trial court granted the motion as the attorneys were interjected into the case by their creation of a critical trial exhibit and the depositions could take place to question the accuracy and methodology to create the chart.

The Fourth District denied Allstate's petition for certiorari, holding that while Allstate showed irreparable harm not correctable on direct appeal as a result of the order, which allows for discovery potentially protected by attorney client or work product privileges due to the questioning of the two attorneys, it failed to show that the order departed from the essential requirements of the law. Florida Rule of Civil Procedure 1.130(a) allows for the taking of the deposition of any person and attorneys are not per se exempt from the reach of the rule.

McClure v. Publix Supermarkets, 124 So. 3d 998 (Fla. 4th DCA 2013)

Plaintiff was allegedly injured in a slip and fall at the Publix. Subsequent to filing suit, she filed a Request for Production requesting the store security video. When Publix failed to respond to this request, she filed a motion to compel. Publix responded that it would produce the requested video following its deposition of the Plaintiff. The trial court denied the Plaintiff's motion to compel production of the video and allowed Publix to delay production of the video until after it completed the deposition of the Plaintiff. Plaintiff filed a Petition for Certiorari. In a 2-1 decision, the Fourth District denied the Petition for Certiorari noting that the Plaintiff had not shown that, if she answered the questions at a deposition prior to production of the video, any harm would occur or whether the video would conflict with her statements at the deposition.

International House of Pancakes (IHOP) v. Robinson, 124 So. 3d 1004 (Fla. 4th DCA 2013)

In a claim stemming from Robinson finding a severed fingertip in a salad served at an IHOP restaurant, the trial court ordered production of a statement taken from the prep cook whose fingertip was in the salad. The Fourth District granted certiorari, holding that the statement was prepared in anticipation of litigation and not in the normal course of business. The Fourth District noted that it was well known that people injured on business premises try to be compensated for their injuries. Thus, the statement to IHOP's insurer was taken in anticipation of reasonable foreseeable litigation.

Moreover, Robinson did not demonstrate a "need" to overcome the work product privilege based on their claim that the prep cook had made multiple prior inconsistent statements about the extent of his finger injury. The courts have uniformly rejected the notion that a party can overcome a work product privilege merely because of the possibility of generating multiple contradictory statements for use as impeachment.

Rocca v. Rones, 125 So. 3d 370 (Fla. 3d DCA 2013)

In a case involving a business dispute, Plaintiff's counsel hired an accounting expert to review records and form an expert opinion regarding the amount of the Plaintiff's damages, as well as, to assist him in the preparation of the case. This expert was initially placed on Plaintiff's list of testifying witnesses, however when the Defendants notified the Plaintiff that they intended to depose the expert, he was removed from the witness list.

The Plaintiff then amended the witness list by adding an accounting expert who was going to testify at trial. Nevertheless, the Defendants argued to the trial court that they needed to depose the first expert because they had no other way of calculating the potential damages. The trial court issued an order requiring that the first expert be deposed, but only as a non-expert fact witness. The expert was deposed and the Defendants inquired on privileged issues, as well as, methods and calculations of the damages the experts had formulated based on the information provided by the Plaintiff. The Defendants then moved to compel in requiring the Plaintiff's attorney to show cause why he should not be held in contempt for refusing to comply with the earlier court order.

The trial court granted both motions and the Plaintiff then filed a Petition for Writ of Certiorari. The Third District granted the petition citing to rule 1.280 of the Florida Rule of Civil Procedure and also noting that "when an expert has been specially employed in preparation of litigation but is not to be called as a witness at trial, the facts known or opinions held are deemed to be work product and may be discovered only by showing of exceptional circumstances, as mandated by Rule 1.280."

Gomez v. Rendon, 126 So. 3d 315 (Fla. 3d DCA 2013)

The Plaintiff in a motor vehicle accident suffered a fractured ankle. Prior to suit being filed, the Plaintiff underwent surgery and once suit was filed, the

Defendant filed a Request for a Pediatric Orthopedic Examination. This examination was conducted in March, 2010. In March, 2011, the Plaintiff advised the Defendant that he was going to have a second surgery in "the immediate future."

Approximately six months later, the Plaintiff underwent the second surgery on his ankle and the medical records from the surgery were then provided to the Defendant in October, 2011. In March, 2012, the IME doctor was deposed and testified that the Plaintiff had no permanent injury at the time that she examined the Plaintiff but did not know whether he had a permanent injury following the second surgery. The doctor further agreed that she would have been in a better position to tell the jury how the Plaintiff was doing if she had seen him after the second surgery.

Three days after the deposition, the Defendant filed a Motion for a Post-Surgery Defense Examination which the trial court denied noting that the examination should have been conducted prior to the deposition of the defense IME. The Third District granted certiorari and quashed the trial court's order finding that there was good cause for the IME and that irreparable injury would be caused by denying the request.

The First Call Ventures, LLC v. Nationwide Nationwide Relocation Services, Inc., 127 So. 3d 691 (Fla. 4th DCA 2013)

Nationwide filed suit against a former employee who was now a First Call employee. It was alleged that the employee misappropriated trade secrets and proprietary information for the use of the employee and First Call. Nationwide subpoenaed records from First Call and the trial court ordered their production subject to a confidentiality order. First Call filed a Petition for Certiorari claiming that the trial court should have conducted an in-camera inspection prior to ordering production of the documents.

Because the records were produced pursuant to a confidentiality order, the Fourth District agreed that an in-camera inspection was unnecessary. Further, an in-camera inspection was not requested before the trial court and the District Court noted that a Petitioner cannot raise a ground that was not raised below when filing a Petition for Writ of Certiorari. They did, however, grant the petition to the extent that the trial court failed to provide for the cost to the non-party to produce the documents.

Sovereign Healthcare v. Fernandes, 38 FLWD 2651 (Fla. 4th DCA 12/18/13)

The Plaintiff sued the nursing home for the death of her husband and, during discovery, filed Interrogatories which sought the names and contact information for all of the nursing home's residents at the time of the patient's death in order to "identify all individuals who either witnessed or had the opportunity to witness the circumstances…relative to the facts and issues in the instant case." The nursing home objected on the grounds that the discovery was overbroad, unduly burdensome and irrelevant and asked for the disclosure of residents' protected health information.

The trial court issued an order granting the motion as to the identity of the residents and further stated that "the disclosure ordered herein is further protected and shall remain confidential for any purpose other than preparation and prosecution of the present lawsuit." The nursing home then filed a Petition for Certiorari arguing that the trial court's order would cause irreparable harm due to the disclosure of identifying personal information of residents in violation of their constitutional right to privacy, as well as, a violation of Florida Statute 400.022(1)(m) which sets forth that the personal and medical records of nursing facilities are confidential.

The Fourth District declined to grant certiorari finding that the nursing home failed to show that it raised the privacy of non-parties in the trial court and specifically did not reference state constitutional or statutory authority. Further, it found that the trial court did not depart from the essential requirements of law because the general scope of discovery includes "the identity and locations of persons having knowledge of any discoverable matter."

Civil Rights Action

Burgess v. North Broward Hospital District, 126 So. 3d 430 (Fla. 4th DCA 2013)

The Fourth District affirmed dismissal with prejudice of Burgess' claim under Section 1983 for denial of access to the courts against North Broward Hospital District. Plaintiff's husband had an unsuccessful emergency craniotomy and died. Burgess brought suit against the hospital and alleged, in pertinent part, that the hospital violated Florida law when it failed to create a risk management report, report the case to AHCA, JCAHO, and report the complications related to a device used to create the burr hole to the FDA and device manufacturer. The hospital maintained that these documents did not exist or no longer existed. As a

result, Burgess maintained the hospital spoliated evidence or intentionally concealed true facts which prevented her from bringing a potential products liability suit against the device manufacturer.

A Section 1983 claim for denial of access to the courts requires a party to identify: (1) a non-frivolous, arguable underlying claim, whether anticipated or lost; (2) the official acts frustrating the litigation; and (3) a remedy that may be awarded as recompense, but that is not otherwise available in future suit.

The trial court correctly determined that Burgess failed element number one because there was nothing alleged in the Complaint that indicated her products liability cause of action was anything more than hope. Burgess' general allegations that the documents would have contained additional information to support a products liability claim did not especially demonstrate that the hospital's action rendered any specific products liability suit ineffective.

Burgess also failed to identify specific "official acts frustrating the litigation." While Burgess alleged that the hospital failed to file or provide her with the required reports, there is nothing to support her leap to the conclusion that the hospital spoliated evidence and intentionally concealed true facts. At most, the hospital was negligent in failing to create these reports.

Default

Mauna Loa Investments v. Santiago, 122 So. 3d 520 (Fla. 3d DCA 2013)

In this case, a default judgment was entered against the Defendant even though at the time that the Amended Motion to Set Aside the Default was filed, the trial court had before it a special warranty deed attached to the Complaint which clearly established that the defaulted Defendant did not own the property on the date of the injury. As such, the Third District reversed finding that a default judgment may not be entered against the Defendant on a Complaint which wholly fails to state a cause of action against the Defendant.

Delayed Discovery Doctrine

Cisko v. Diocese of Steubenville, 123 So. 3d 83 (Fla. 3d DCA 2013)

In May, 2009, the Plaintiff sued the Diocese for negligence related to physical and sexual abuse they allegedly suffered between 1966 and 1967 by two priests under the Diocese's supervision. The Complaint alleged that the events produced traumatic amnesia that blocked her memory of the abuse until May, 2005. The Diocese moved for Summary Judgment claiming the four year statute of limitations barred the action and the Plaintiff argued that the action was permissible under the delayed discovery doctrine as set forth in *Herndon v. Graham*, 767 So. 2d 1179 (Fla. 2000). The trial court concluded that *Herndon* did not apply to the negligence action and entered summary judgment reasoning that *Herndon* was limited to intentional tort actions against the perpetrator for childhood sexual abuse. The Third District agreed and affirmed.

Deposition of Non-Resident Corporate Defendant

Dan Euser Waterarchitecture, Inc. v. City of Miami Beach, 112 So. 3d 683 (Fla. 3d DCA 2013)

Dan Euser Waterartechitecture, Inc. was a Defendant in a design and construction case involving a park renovation project. Euser is a Canadian corporation having its principle place of business in Ontario. Its corporate representative is a resident of Ontario and all of their documents and files related to the litigation are located in Ontario. Additionally, Euser was not seeking any affirmative relief.

Despite this, the Trial Court denied Euser's Motion for Protective Order and ordered that Euser's corporate representative appear for deposition in Miami-Dade County, Florida, as opposed to its headquarters in Ontario. The Third District granted certiorari and held that "a Defendant will not be required to travel a great distance and incur substantial expenses to be deposed by the Plaintiff, unless the Defendant is seeking affirmative relief. Thus, under Florida law, a non-resident corporate Defendant need not produce a non-resident corporate officer in Florida."

Disqualification

Bellgrave-Simmonds v. Bellgrave, 122 So. 3d 964 (Fla. 4th DCA 2013)

The Petitioner filed a Motion to Disqualify the trial judge on November 20, 2012 and on February 23, 2013, the trial court denied the motion. Because the

ruling was more than 30 days after the disqualification motion was filed, the Fourth District quashed the order holding that the motion should have been deemed granted after the expiration of the 30-day time period following the service of the motion.

M.B. v. S.P., M.D., 124 So. 3d 358 (Fla. 2d DCA 2013)

In this medical malpractice case, the trial court granted a Motion in Limine thereby preventing the Plaintiff from introducing evidence that the Defendant doctor took seven years to pass the board certification examination and that he passed the written portion on the examination on his fourth try and the oral portion of the examination on his third try.

The Second District upheld the trial court's decision finding that the doctor's repeated failures of the board certification examination was irrelevant to the issue of his alleged negligence in performing the subject surgery. They contrasted their decision with other decisions which held that evidence of a physician's lack of board certification may be used to impeach the physician's creditability as an expert witness. Thus the Defendant may provide information regarding his education, training, professional experience and license to practice medicine and, if he does not offer evidence of his intellect, grades, special licenses, academic honors, etc., then failure to pass the board and certification examination is irrelevant.

At the same time, the Second District granted a Motion for New Trial finding that the trial court's failure to disqualify itself or grant a mistrial was an error. During the Plaintiff's testimony at trial, she described having to live with a nephrostomy tube and urine bag. During an extensive answer, counsel approached the bench and objected to the narrative and asked the trial court to "instruct the witness not to refer to incontinence." The Plaintiff's counsel conceded that his client was providing "a long answer" and at that point the trial court commented "it is." I am "bagged out."

Later during a sidebar, the Plaintiff's attorney saw a note affixed to the verdict form lying on the Court bench which read "bag lady with shits (full of) barfer, too." The Plaintiff's counsel immediately moved for a mistrial on the basis of the note. The Court initially acknowledged the note and then retracted it and stated that he did not have it and then continued by saying "what notes I take up

here are absolutely no business of counsel" and that" if I sit up here and do crossword puzzles, it's none of your damn business either."

The Second District found that the Motion for Disqualification clearly met the requirements of the administrative rule and that the comments of the trial court in addition to his handwritten notes could cause the Plaintiff to have a well-founded fear that she would not receive a fair and impartial trial.

Domville v. State of Florida, 125 So. 3d 178 (Fla. 4th DCA 2013)

The Fourth District certified the following question:

> Where the reciting Judge in a criminal case has accepted the prosecutor assigned to the case as a Facebook "friend," would a reasonably prudent person fear that he could not get a fair and impartial trial, so that the Defendant's Motion for Disqualification should be granted?

Judge Gross in a special concurrence noted that Judges do not have "the unfettered social freedom of teenagers." Central to the public's confidence in the courts is the belief that fair decisions are rendered by impartial tribunal. Maintaining the appearance of impartiality requires avoiding entanglements and relationships that compromise at appearance. A person who accepts the responsibility of being a Judge must also accept limitations on personal freedom.

Five Day Mailing Rule

Miccosukee Tribe v. Lewis, 122 So. 3d 504 (Fla. 3d DCA 2013)

In this case, the trial court entered an order clarifying fact discovery deadlines on July 15, 2013. On July 23, 2013, the Petitioner filed a Motion for Reconsideration of the clarification order and the court denied the Motion for Reconsideration on July 25, 2013. On August 19, 2013, the Petitioner filed a Petition for Writ seeing review of the clarification order rendered July 15, 2013. The Respondent moved to dismiss the petition as being untimely.

The Third District granted the Motion to Dismiss noting that the Motion for Reconsideration was not an authorized motion and did not suspend rendition or toll the time for filing the petition. Nevertheless, the Petitioner argued that it was entitled to an additional five days to file the petition citing Florida Rule of Judicial

Administration 2.514(b) which provides that "when a party may or must act within a specified time after service and services made by mail or e-mail, five days are added after the period that would otherwise expire under subdivision (a).

The Third District commented that the Petitioner misconstrued the rule noting that the additional five day time period applies when another rule requires a party to act within a specified time after service and that this rule affords no additional time when a party is required to act within a specified time after rendition of an order.

Forum Non Conveniens

S2 Global, Inc., v. Tactical Operational Support Svcs., LLC, 119 So. 3d 1280 (Fla. 4th DCA 2013)

The Fourth District reversed an order granting dismissal on *forum non conveniens* finding the trial court erred in determining the motion was untimely due to excusable neglect. Florida Rule of Civil Procedure 1.061 requires that a motion to dismiss an action on grounds of *forum non conveniens* be served no later than 60 days after service of process on the moving party.

The factors giving rise to a finding of excusable neglect typically have administrative mishandling, secretarial errors, and calendaring issues. Strategic decisions to handle the case a certain way and reconsideration of tactical decisions and judgment calls do not constitute a basis for finding excusable neglect.

Cortez v. Palace Resorts, Inc., 123 So. 3d 1085 (Fla. 2013)

The Florida Supreme Court quashed an order dismissing Plaintiff's Florida claim based on the doctrine of *forum non conveniens*. The Plaintiff, a California resident, was incorrectly forced to litigate a claim in Mexico against Defendants headquartered in Florida. The complaint alleged an assault that took place in Mexico but derived from allegedly negligent conduct that occurred in Florida.

An out of state plaintiff is still entitled to a strong presumption in the forum non conveniens analysis against disturbing the plaintiff's initial choice of forum. Before denying a United States citizen access to the courts of this country, the reviewing court must require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest. The fact that the Defendants were located in Florida suggested it would

be less burdensome for the Defendants to defend suit in Florida than it would be for the Plaintiff to litigate in a foreign country.

Inadvertent Disclosure of Privileged Materials

Construction Systems of America, Inc. v. Travelers Ins. Co., 118 So. 3d 942 (Fla. 3d DCA 2013)

The attorney for Construction Systems reviewed various documents at the office of MK Contractors. These records were marked to be duplicated by a copy service and then forwarded to counsel. Nine months after the document inspection, counsel for MK Contractors realized that the binders contained privileged documents and filed a Motion to Compel return of the documents and a Motion to Disqualify Counsel for CSA.

These matters were referred to a special magistrate and after a lengthy evidentiary hearing, the Magistrate issued a report and recommendation finding the documents constituted fact work product, but concluded that MKC had waived the privilege and therefore, recommended denial of both motions. MKC filed exceptions to the report and the trial court rejected the recommendations and granted the motions concluding that the privilege had not been waived and that the possibility that CSA had gained an unfair informational advantage from the disclosure required disqualification.

Exceptions to the Magistrate's report are to be reviewed by determining whether the factual findings and conclusions are supported by competent substantial evidence and to determine whether the Magistrate misconceived the legal effect of the evidence or whether the conclusions are clearly erroneous. In this case, the Third District noted that there is a 5-factor relevant circumstances test to determine whether a party waived privilege through inadvertent disclosure: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure and the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) were there any delays and measures taken to rectify the disclosures; and (5) whether the overriding interest of justice would be served by relieving a party of its error.

The Third District found that the trial court was within its authority by accepting the facts as found by the Magistrate but determining that the Magistrate misconceived the legal effect of the evidence. As for the disqualification of

counsel, the Third District granted certiorari. They noted that the movant must establish that "the inadvertently disclosed information is protected, either by privilege or confidentiality, and that there is a possibility that the receiving party has obtained an unfair informational advantage as a result of the inadvertent disclosure." In this case, the trial court made creditability determinations based upon testimony presented to the Magistrate which the Third District found was error. Therefore, they granted certiorari and ordered that the matter be remanded to the Magistrate for further determination on the issue of disqualification.

In Camera Inspection Unnecessary When Confidentiality Order Used

The First Call Ventures, LLC v. Nationwide Relocation Services, Inc., So. 3d 127 So. 3d 691 (Fla. 4th DCA 2013)

Nationwide filed suit against a former employee who was now a First Call employee. It was alleged that the employee misappropriated trade secrets and proprietary information for the use of the employee and First Call. Nationwide subpoenaed records from First Call and the trial court ordered their production subject to a confidentiality order. First Call filed a Petition for Certiorari claiming that the trial court should have conducted an in-camera inspection prior to ordering production of the documents. Because the records were produced pursuant to a confidentiality order, the Fourth District agreed that an in-camera inspection was unnecessary. Further, an in-camera inspection was not requested before the trial court and the District Court noted that a Petitioner cannot raise a ground that was not raised below when filing a Petition for Writ of Certiorari. They did, however, grant the petition to the extent that the trial court failed to provide for the cost to the non-party to produce the documents.

Judges and Social Media

Domville v. State of Florida, 125 So. 3d 178 (Fla. 4th DCA 2013)

The Fourth District certified the following question:

> Where the reciting Judge in a criminal case has accepted the prosecutor assigned to the case as a Facebook "friend," would a reasonably prudent person fear that he could not get a fair and impartial trial, so that the Defendant's Motion for Disqualification should be granted?

Judge Gross in a special concurrence noted that Judges do not have "the unfettered social freedom of teenagers." Central to the public's confidence in the courts is the belief that fair decisions are rendered by impartial tribunal. Maintaining the appearance of impartiality requires avoiding entanglements and relationships that compromise at appearance. A person who accepts the responsibility of being a Judge must also accept limitations on personal freedom.

Medicaid Lien

Dillard v. Agency for Healthcare Administration, 38 FLWD 2046 (Fla. 2d DCA 11/27/13)

The Plaintiff was catastrophically injured when he overdosed on cocaine shortly after he was taken into custody at a Juvenile Detention Center. The minor's mother filed suit against various parties claiming that he had been denied appropriate medical attention at the detention center. The case settled, and, because the minor had received and continues to receive Medicaid benefits to cover his medical expenses, AHCA, which administers Florida's Medicaid program, asserted its right to be reimbursed from the settlement. The Plaintiff moved to reduce the Medicaid lien and the Circuit Court denied the motion.

The Second District noted that, at the time the trial court entered the order, its decision was well reasoned and was legally accurate because it relied upon case law that had since been overturned. Accordingly, the Second District reversed based upon the United States Supreme Court's decision in *Wos v. E.M.A.*, 133 S. Ct. 1391 (2013) and *AHCA v. Riley*. 119 So. 3d 514 (Fla. 2d DCA 2013) which held that the State may not demand any portion of the Medicaid beneficiary's tort recovery, except that share which is attributable to medical expenses.

Agency for Healthcare Administration v. Williams, 38 FLWD 2545 (Fla. 4th DCA 12/4/13)

The trial court entered an order limiting the agency's Medicaid payments lien based upon an allocation formula asserted by the Plaintiff as opposed to the default application provisions of Florida Statute 409.910(11)(f). In reversing the trial court's order, the Fourth District reversed held that it was error to adopt the allocation formula without conducting an evidentiary hearing. Based upon the United States Supreme Court's decision in *Wos v. E.M.A.*, 133 S. Ct. (2013) and the Fourth District's decision in *Roberts v. Albertson's, Inc.* 119 So. 3d 457 (Fla. 4th DCA 2012) the Fourth District noted that Medicaid allocation must be based upon evidence.

Davis v. Roberts, 39 FLWD 1 (Fla. 5th DCA 12/20/2013)

The parents brought suit for damages sustained by their child. Following settlement, the trial court ordered that the Agency for Healthcare Administration (AHCA) was entitled to recover the full amount of its Medicaid lien out of the proceeds of the minor's personal injury settlement pursuant to Florida Statutes §409.910. The Fifth District reversed the trial court's decision finding that the trial court had discretion to limit re-payment of the lien. They held that the Medicaid recipient should be afforded the opportunity to seek the reduction of the Medicaid lien amount by demonstrating, with evidence, that the lien amount established by statute exceeds the amount recovered for medical expenses.

In this case, the 9-year old Plaintiff was rendered a paraplegic and she lost two siblings when the van her mother was driving collided head on into a pick-up truck. She was treated at a hospital for her injuries and AHCA paid the bills and claimed a lien with more than $230,000. Additionally, the Florida Department of Health's Spinal Cord Injury Program also asserted a lien for $6,340. A settlement was reached whereby Hunter was to be paid $1,000,000. The parties agreed, however, that based upon insurance caps and comparative negligence, the $1,000,000 settlement represented 10% of the total value of all of her damages, including past medical expenses.

As a result, the settlement agreement allocated just less than $24,000 towards the past medical expenses (constituting that 10% of the lien claimed by AHCA and the Spinal Cord Injury Program). AHCA argued that the settlement and allocation were invalid because AHCA did not consent and further set forth that Florida Statute §409.910 controlled and required re-payment of AHCA's full lien amount. The trial court ruled in favor of AHCA believing that it was required to do so pursuant to the Statute. The Fifth District reversed and stated that the United States Supreme Court precedent expressly authorized a Plaintiff to seek, by way of an evidentiary hearing, the reduction of the Medicaid lien amount established by the statutory allocation.

Motions to Dismiss

Steiner Trans Ocean Limited v. Efremova, 109 So. 3d 871 (Fla. 3d DCA 2013)

Efremova filed a Complaint for injuries she sustained while employed as a hair stylist aboard a Carnival Cruise Ship but did not attach her employment contract to the Complaint. Steiner moved to dismiss contending that the mandatory

forum selection clause in Efremova's employment contract required her to file the action in federal court. Steiner attached a copy of the employment contract to its Motion.

The trial court denied the motion to dismiss on grounds that because the employment contract was not attached to the Complaint, it was precluded from looking beyond the four corners of the Complaint to determine whether a valid contractual forum selection clause applied to its cause of action. The Third District reversed. A court can consider evidence outside of the four corners of the Complaint when a motion to dismiss challenges subject matter jurisdiction or personal jurisdiction, or when the motion to dismiss is based upon forum non conveniens or improper venue.

Steiner's Motion to Dismiss based on a contractual forum selection clause was similar to a motion to dismiss for improper venue. It fell under an exception to the four corners rule, especially considering that in Florida, forum selection clauses are presumptively valid and is the burden of the party seeking to avoid that contractual agreement to establish "that trial in the contractual form will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."

Andrew v. Shands at Lakeshore, Inc., 38 FLWD 2643 (Fla. 1st DCA 12/17/2013)

The Andrews sued Shands for the alleged negligence of a radiologist who provided care to their son at a Shands facility. They alleged that the radiologist was a Shands employee, servant, apparent agent, or independent contractor or acted within the course and scope of his employment through a joint venture between Shands and the University of Florida. The Plaintiffs attached documents to their Complaint including the Shands certification and authorization form which contained a notice provision pursuant to §240.215 of the Florida Statute stating that the patient acknowledged that he may receive care from radiologists who are not the employees or agents of Shands.

Shands moved to dismiss on the ground that the notice provision refuted various counts of the Complaint against them and the trial court granted the motion and dismissed the claims with prejudice on a finding that the Complaint failed to state a cause of action against Shands. The First District reversed the dismissal noting that the trial court was required to confine its review to allegations contained in the Complaint and any attached documents and thus, "not speculate as

to what the true facts may be or what facts may be ultimately proved in the trial of the cause."

No Settlement

Villareal v. Eres, 128 So. 3d 93 (Fla. 2d DCA 2013)

In a wrongful death and personal injury claim stemming from a car accident, the Plaintiff, Eres, asked for insurance coverage information and offered to settle for policy limits. The settlement offer contained a number of conditions, including a time-limit for acceptance and a requirement that the release not contain hold-harmless/indemnification language. Villareal complied with all conditions, except the proposed release contained hold-harmless/indemnification language. Eres advised this was a counter-offer, rejected and filed suit.

Villareal raised the affirmative defense that the parties had entered a settlement. Eres denied this and obtained partial summary judgment in her favor. The case proceeded to trial and resulted in a large verdict for Eres. On appeal, the Second District noted that settlement agreements are governed by contract law and found that no settlement was entered in to. Correspondence from Eres' counsel stated: "Please understand providing us with any release containing . . . a hold harmless indemnity agreement, would act as a rejection of this good faith offer to settle this matter."

The Second District determined that Eres' offer was an offer for unilateral contract, which conditioned Villareal's acceptance on specified performance, a release with the exact terms as specified in the offer. Of no importance to the court was Villareal's counsel's correspondence to the effect that she would change or strike any objectionable language in the release.

Offer of Judgment/Proposal for Settlement

Cobb v. Durando, 111 So. 3d 277 (Fla. 2d DCA 2013)

The trial court granted attorney's fees pursuant to a demand for judgment filed by a husband and wife against a roofer in a breach of contract for roofing services claim. The roof was for their home which they owned as husband and wife. The demand for judgment did not attribute an amount of the demand for each party, but rather, the Plaintiff's position was that a Proposal for Settlement by husband and wife when the property was owned as tenants by the entireties

constitutes a single offer made by one person. The Second District reversed and held the demand for judgment was faulty because it did not state the amount attributable to each party.

Alamo Financing v. Mazoff, 112 So. 3d 626 (Fla. 4th DCA 2013)

The Plaintiff was injured when he was struck by a vehicle owned by Alamo Financing. The vehicle was rented by Alamo Rental (US), Inc. and was driven by its renter, Paola Alvarado-Fernandez. In the First Amended Complaint the Plaintiff alleged that Alamo Financing was vicariously liable for the negligence of Alvarado-Fernandez. Thereafter, Alamo Financing served a Proposal for Settlement to resolve "all claims made of the present action by the party to whom this proposal is made including any claims that can be made against Alamo Financing, LP, which arise out of the same occurrence or event set forth in this action."

One of the conditions of the proposal was that the Plaintiff would execute a Stipulation for Dismissal with Prejudice as to Alamo Financing. Another condition of the proposal was that the Plaintiff would execute a release in favor of Alamo Financing. Specifically, that condition stated "(4) Plaintiff shall execute a General Release of the Defendant, Alamo Financing, LP in the form General Release attached as Exhibit "A." If no release is attached or Plaintiff objects to the form of the release in Exhibit "A", then a General Release to effectuate a settlement as contemplated by *Irhardt v. Duff*, 729 So. 2d 529 (Fla. 4th DCA 1999)."

The General Release attached to the Proposal for Settlement provided that the Plaintiff would release Alamo Financing "and their parent corporations, subsidiaries, officers, directors and employees" from any and all claims. The Plaintiff did not respond to the proposal, and, therefore, it was deemed rejected. Alamo Financing then moved for Summary Judgment arguing that it was entitled to judgment in its favor as a matter of law under the Graves Amendment.

Shortly before the Summary Judgment hearing, the Plaintiff moved for leave to file a Second Amended Complaint, in part, to add Alamo Rental as a Defendant in the lawsuit. The Plaintiff alleged that Alamo Rental was negligent for failing to properly inspect the driver's license of Alvarado-Fernandez before renting the vehicle to her.

Thereafter, the trial court granted Alamo Financing's Motion for Summary Judgment but also granted the Plaintiff leave to file a Second Amended Complaint. The trial court ultimately entered the Final Judgment in favor of Alamo Financing and this Final Judgment was affirmed. After Final Judgment was entered, Alamo Financing moved for attorney's fees and costs based upon the Proposal for Settlement the Plaintiff had rejected.

The Fourth District held that Alamo Financing was entitled to attorney's fees and agreed that the reference to "subsidiaries" in the General Release attached to the Proposal for Settlement did not render the proposal ambiguous. They also held that the Proposal for Settlement was not an undifferentiated joint offer that would have allowed for the Plaintiff's claims against Alvarado-Fernandez to be extinguished.

State Farm v. Laughlin-Alfonso, 118 So. 3d 314 (Fla. 3d DCA 2013)

Laughlin-Alfonso submitted a supplemental home damage claim to State Farm through her public adjuster. After this, State Farm requested several documents from her, which included a sworn proof of loss. Laughlin-Alfonso did not comply with these requests. Thereafter, she filed suit and once again, she did not comply with any of State Farm's requests during the course of discovery. She also rejected State Farm's nominal settlement offer. After State Farm prevailed, it moved for attorney's fees which the trial court denied finding that its nominal settlement offer was made in bad faith.

The Third District reversed finding that State Farm did not act in bad faith when it made the nominal settlement offer. In so doing, they commented that insureds must comply with the conditions precedent to filing a lawsuit including submission of a sworn proof of loss. Because the insured failed to do so, State Farm had a reasonable basis to conclude that its exposure was nominal.

UCF Athletics Association, Inc. v. Plancher, 121 So. 3d 616 (Fla. 5th DCA 2013)

The Plaintiff's son was a football player at the University of Central Florida who died during practice. They brought suit against various entities including UCF Athletics Association, Inc. The Plaintiff's filed a proposal for settlement, and, after trial, the jury found the Association liable and awarded damages in the amount of $10,000,000, which greatly exceeded the proposal for settlement. Thereafter, the Plaintiff's timely moved for and were granted attorney's fees and

costs pursuant to Florida Statute 768.79. The Fifth District, in a companion case, found that UCF Athletics Association, Inc. was entitled to sovereign immunity. Accordingly, they reversed the award of attorney's fees and costs pursuant to the proposal for settlement, noting that it is a judgment obtained, rather than the verdict, which controls whether fees can be awarded under the statute.

Bradshaw v. Boynton JCP Associates, Ltd., 125 So. 3d 289 (Fla. 4th DCA 2013)

Upon verdict in favor of the Defendants, they moved for attorney's fees pursuant to an offer of judgment. The trial court awarded the fees, however, the Fourth District reversed finding that "the offer was apostrophe-challenged, creating ambiguities as to whether the drafter intended references to singular or plural Defendants or Plaintiffs." In this case, the Fourth District found that the ambiguities found within the proposal could reasonably have affected the Plaintiff's decision on whether to accept the proposal for settlement.

Braxton v. Grabowski, 125 So. 3d 936 (Fla. 2d DCA 2013)

Following a verdict in favor of a Defendant in a motor vehicle accident, the Plaintiff filed an appeal. There was little meaningful activity in the appeal and the Defendant's appellate counsel only filed an appearance and a notice of his email address. The Circuit Court clerk also sent the Appellate Court a one volume record that did not include a trial transcript and, with nothing else having been filed, the Plaintiff dismissed her appeal. Thereafter, the Defendant's appellate counsel filed a Motion for Attorney's Fees claiming that he was entitled to fees under Florida Stature §768.79 in light of a proposal for settlement that had been served in the Circuit Court.

At first, the Second District denied the motion for fees assuming that the fees incurred by the Defendant's appellate counsel would be small. The Defendant's appellate counsel then moved for re-hearing and argued that, as long as the movant met the requirements of §768.79, entitlement to fees was mandatory. The Second District ultimately agreed based on precedent from their own court, however, they added that, without this precedent, they likely would have followed the lead of the Third District and denied the motion for rehearing because the fees should be *de minimis.*

Regions Bank v. Rhodes, 126 So. 3d (Fla. 4th DCA 2013)

34 days after being added as a Defendant to a case, the Defendant served the Defendant with an Offer of Judgment/Proposal for Settlement. The Court subsequently entered summary judgment in favor of the Defendant and the Defendant moved for attorney's fees and costs pursuant to the offer/proposal. The trial court denied the bank's motion for attorney's fees and costs finding that the proposal was premature and, thus, invalid under Rule 1.442(b) of the Florida Rules of Civil Procedure. The Fourth District affirmed finding that the premature filing did not meet the plain language requirements of Rule 1.442. In doing so, they noted conflict with the Third District's decisions which held that premature offers of judgment were harmless technical violations which did not invalidate the offers. See *Shoppes of Liberty City, LLC v. Sotolongo*, 932 So. 2d 468 (Fla. 3d DCA 2006).

Personnel Records

Walker v. Ruot, 111 So. 3d 924 (Fla. 5th DCA 2013)

The Plaintiffs filed a negligence action for injuries sustained in a rear-end collision. They sued the driver, Paul Walker and his employer, Bright House Networks. The Plaintiff's requested Walker's personnel file and Bright House objected on the grounds that the file contained irrelevant information and production of the file would reveal Walker's confidential information and thus violate his privacy rights.

The Plaintiff filed a Motion to Compel and argued that the information in the personnel file was discoverable because it might support claims for negligent entrustment, negligent hiring, and/or negligent retention. They also argued that the information might aid them in locating Walker to effectuate service of process. Bright House again objected on relevancy grounds, but properly conceded that it lacked standing to assert Walker's privacy rights.

Without conducting an in-camera inspection, the Court entered an Order compelling the production of the entire file. The Fifth District granted certiorari and noted that while Bright House lacked standing to assert Walker's privacy rights, it possessed standing to oppose a production of private information within the file on the grounds that the information was irrelevant. The Fifth District noted that because Walker had not yet been served and his whereabouts were unknown, he lacked the opportunity to personally assert a privacy objection.

They added that, when privacy rights are implicated, discovery should be narrowly tailored to provide access to discoverable information while safeguarding privacy rights. They added that the personnel file would likely contain information about his compensation, benefits, pension, etc., which would be irrelevant, but it might contain information regarding his training, competence, abilities and disciplinary history which might be relevant to the underlying negligence action and might also contain discoverable information which might be helpful in locating the driver.

Privilege Log

D.L.J. Mortgage Capital, Inc. v. Fox, 112 So. 3d 644 (Fla. 4th DCA 2013)

The Respondent propounded a Request for Production in a mortgage foreclosure action. Four months after a response was due, the Petitioner objected and did not file a privilege log. The trial court ordered production of the documents finding that the Petitioner's failure to file the privilege log constituted a waiver of privilege as to various items. The Fourth District reversed.

Although they noted the trial court has discretion to find a waiver of privilege from the failure to file a privilege log, they ruled that the time for filing a privilege log was tolled until the trial court ruled on the Petitioner's objections regarding the scope of discovery. Further, the Petitioner did object to various discovery requests based on certain categories (work product and attorney/client privilege). As such, the Fourth District granted the Petition for Writ of Certiorari, ordered the Trial Court to rule on the non-privilege objections and then allow the Petitioner an opportunity to file a privilege log within a reasonable period of time thereafter.

Pro Hac Vice

Trans Health Mgmt, Inc., v. Webb, 38 FLW D2585 (Fla. 1st DCA 12/10/13)

Trial court abused its discretion by denying and striking motion of non-Florida attorney to appear *pro hac vice* on the morning of trial. While the trial court found the fact that the attorney filed the motion on the morning of trial "frankly unacceptable", there is no appellate decision to suggest this was a legally permissible basis to deny such a motion. Denial of motion to appear *pro hac vice*

must be based on a legally permissible basis, and should be based on matters that appear of record before the court.

Qualified Privilege for Attorney's Alleged Defamatory Comments

Delmonico v. Traynor, 116 So. 3d 1205 (Fla. 2013)

Delmonico sued business competitors alleging defamation. The competitors hired an attorney, Traynor, to defend the claim. In his investigation, Traynor allegedly made defamatory statements about Delmonico to potential witnesses. Delmonico then sued Traynor for defamation and tortuous interference with business relationships. Traynor moved for summary judgment on the basis that his statements were absolutely privileged as they were made in the course of interviewing potential witnesses for pending litigation. The trial court granted the motion and the Fourth District affirmed.

Florida's absolute privilege does not immunize an attorney from liability for alleged defamatory statements he made during *ex-parte* out of court questioning of a potential non-party witness in the course of investigating a pending lawsuit. A qualified privilege applied to such statements, so long as they were relevant to the subject of inquiry in the underlying suit. As the attorney's allegedly defamatory remarks--that the president was being prosecuted for hiring prostitutes to lure away the competitors' customers--were relevant, plaintiffs had to overcome the qualified privilege afforded to the attorney and his law firm by establishing express malice.

Releases

Roman v. Bogle, 113 So. 3d 1011 (Fla. 5th DCA 2013)

The driver and passenger of an automobile died after the driver ran a red light and collided with a semi-trailer. The passenger's estate filed a wrongful death action against the Estate of the driver, and the driver's father who owned the vehicle. The vehicle owner, Lesore Gabriel, was named as a Defendant pursuant to the dangerous instrumentality doctrine. Roman, the Personal Representative of the deceased passenger, executed a Release with Mr. Gabriel, which released "Lesore Gabriel and First Acceptance Company, Inc., including their officers, agents, employees, successors and assigns."

The driver's Personal Representative raised the affirmative defense of release and accord of satisfaction based upon the Release executed between Roman

and Gabriel. Roman did not file a reply to the affirmative defense. The driver's Personal Representative filed a Motion for Judgment on the Pleadings asserting that pursuant to the dangerous instrumentality doctrine the driver was the agent of Mr. Gabriel by virtue of the fact that he was driving the automobile with his consent. The trial court granted the motion and entered judgment in favor of the driver based on the release.

The primary issue on appeal was whether the application of the dangerous instrumentality doctrine necessarily makes the driver an agent of the owner for purposes of determining whether the provisions of a release, which releases and discharges the owner and his "agents", applied to relieve the negligent driver of liability.

The Fifth District reversed, holding that the dangerous instrumentality doctrine is a judicially created doctrine premised on the theory that one who originates the danger by entrusting his vehicle to another is in the best position to make certain there will be adequate resources with which to pay the damages caused by its negligent operation. Liability pursuant to the doctrine is not premised on principles of respondeat superior, agency, or master and servant. Application of the dangerous instrumentality doctrine does not create an agency relationship.

Remittitur

R.J. Reynolds Tobacco Company v. Webb, 38 FLWD 2637 (Fla. 1st DCA 12/17/13)

The jury awarded the Plaintiff $7,200,000 in compensatory damages and $72,000,000 in punitive damages in this wrongful death suit. The First District vacated the damage award earlier finding that the amount of the compensatory damages suggested an award that was the product of passion. It remanded the case to the trial court with directions to either grant Reynold's Motion for Remittitur or hold a new trial on damages.

On remand, the Plaintiff sought a Remittitur to $4,000,000 in compensatory damages and $25,000,000 in punitive damages. Reynolds responded with a renewed Motion for Remittitur seeking $250,000 or less in compensatory damages and a similar amount in punitive damages. The trial court entered an order of remittitur remitting damages to $4,000,000 less 10% comparative negligence for a total award of $3,600,000 and also awarded $25,000,000 in punitive damages. The

order went on to state that the Defendant was "not entitled to a new trial for compensatory and punitive damages unless it was at the election of the Plaintiff" and gave the Plaintiff 10 days to consent or object to the Remittitur. The Plaintiff consented, the Defendant objected and the trial court entered a final judgment for a total of $28,600,000.

RJ Reynolds argued that the trial court erred in failing to hold a new trial on damages after they objected to the remitted damaged amounts. The First District agreed concluding that, because RJ Reynolds was "the party adversely affected" by the remittitur, and because they timely objected, it was entitled to a new trial on damages.

Right to Privacy

Walker v. Ruot, 111 So. 3d 924 (Fla. 5th DCA 2013)

The Plaintiffs filed a negligence action for injuries sustained in a rear-end collision. They sued the driver, Paul Walker and his employer, Bright House Networks. The Plaintiff's requested Walker's personnel file and Bright House objected on the grounds that the file contained irrelevant information and production of the file would reveal Walker's confidential information and thus violate his privacy rights.

The Plaintiff filed a Motion to Compel and argued that the information in the personnel file was discoverable because it might support claims for negligent entrustment, negligent hiring, and/or negligent retention. They also argued that the information might aid them in locating Walker to effectuate service of process. Bright House again objected on relevancy grounds, but properly conceded that it lacked standing to assert Walker's privacy rights.

Without conducting an in-camera inspection, the Court entered an Order compelling the production of the entire file. The Fifth District granted certiorari and noted that while Bright House lacked standing to assert Walker's privacy rights, it possessed standing to oppose a production of private information within the file on the grounds that the information was irrelevant. The Fifth District noted that because Walker had not yet been served and his whereabouts were unknown, he lacked the opportunity to personally assert a privacy objection.

They added that, when privacy rights are implicated, discovery should be narrowly tailored to provide access to discoverable information while safeguarding

privacy rights. They added that the personnel file would likely contain information about his compensation, benefits, pension, etc., which would be irrelevant, but it might contain information regarding his training, competence, abilities and disciplinary history which might be relevant to the underlying negligence action and might also contain discoverable information which might be helpful in locating the driver.

Service of Process

Chigurupati v. Progressive American Insurance Company, 38 FLWD 2613 (Fla. 4th DCA 12/11/13)

The Chigurupatis were Ohio residents who were involved in an automobile accident in St. Lucie County. Progressive insured the driver of the other vehicle involved in the automobile accident and filed suit against the Chigurupatis to recover amounts paid to its insured. It served them by individual and substitute service at their home and the process server filled out, signed and filed a "verified return of service." In the "verified return of service" the process server outlined the time, manner and place of service, however, it was not notarized. When no answer or response was filed, Progressive obtained a default. The Chigurupatis then filed a Motion to Quash Service and Vacate Default arguing that the Court lacked personal jurisdiction over them because the returns of service were not notarized and were invalid. The trial court denied the Motion to Quash and the Fourth District reversed finding that service was improper because the verification of service filed before default was not sworn or notarized pursuant to Florida Statute 48.194.

Ship's Doctor Not Subject to Jurisdiction of Florida Court

Taylor v. Gutierrez, 38 FLWD 2557 (Fla. 3d DCA 12/4/13)

The Plaintiff and her husband left from Miami on a cruise aboard the Royal Caribbean Cruise Line ship. A couple of days into the cruise, the Plaintiff visited the ship's medical facility as it approached Haiti, complaining of severe abdominal pain. She was seen by, amongst others, Dr. Taylor, the ship's physician. Dr. Taylor diagnosed and treated her for gastritis. Her condition worsened and, upon reaching a port in Mexico, the patient disembarked the ship and went to a Mexican hospital where she underwent abdominal surgery. She was allegedly treated for abdominal sepsis and multiple organ failure. Thereafter, she suffered a cerebral hemorrhage.

She then filed an action in Miami against Dr. Taylor and the cruise line. With respect to jurisdiction, the Complaint alleged that Dr. Taylor, a British citizen who does not own real property in Florida, and who is not licensed to practice in Florida, because of his "substantial and not isolated activity within the State of Florida" was subject to the jurisdiction of Florida's courts. Jurisdictional discovery took place and revealed that Dr. Taylor entered into an Employment Agreement with a Florida-based cruise line; attended annual medical conferences in Florida received advanced cardiac life support re-certification in Florida vacationed from time to time in Florida; had bank accounts in Florida and worked on a cruise ship that embarked and disembarked in a Florida port one day per week.

Despite this activity, the Third District found that Dr. Taylor was not subject to the jurisdiction of a Florida court. Moreover, they noted that even if he treated someone in Florida territorial waters while coming into or going out of Court, this also did not confer jurisdiction upon the Florida courts.

Statute of Limitations

Baxter v. Northrup, 39 FLWD 4 (Fla. 5th DCA 12/20/2013)

Dr. Northrup performed left hip replacement surgery on the patient on November 2, 2004. The following day, the patient noticed that his leg was numb and he had a foot drop. Dr. Northrup and the medical staff told him that the symptoms would abate after a period of physical therapy. Based upon these assurances, he continued to treat with Dr. Northrup. When his symptoms did not improve, the patient saw a neurologist on April 6, 2005 who advised that his neurological deficit was likely permanent. Thereafter, he sought legal counsel and served a statutory Notice of Intent dated June 25, 2007.

After suit was filed, the Defendants moved for summary judgment asserting that the Notice of Intent and lawsuit were untimely because the statute of limitations, with tolling, had expired on February 1, 2007. They argued that the statute of limitations began to run on November 3, 2004; the day when he became aware that he had a foot drop. The trial court agreed and granted summary judgment including that the statute of limitations commenced "upon the Plaintiff's discovery of the injury itself."

The Fifth District reversed finding that there was still a question of fact as to when the Plaintiff knew or should have known of the possibility of medical negligence.

They emphasize that when a patient suffers a foot drop after the hip replacement surgery, but claims that he was told the symptoms would abate after a period of physical therapy, the statute of limitations did not necessarily begin to run on the date he became aware that he had a foot drop.

Statute of Repose

Woodward v. Olson, 107 So. 3d 540 (Fla. 2d DCA 2013)

In September, 2002, the Plaintiff fell from her roof and went to the emergency room for treatment. A chest x-ray was taken and according to the radiologist's report, the chest x-rays showed "an area of increased density" in the right lung and the radiologist recommended further follow up on this issue. Her primary care physician received this report but did not mention the report to the patient or order the recommended follow up tests.

The patient saw Dr. Olson from time to time over the next 3 years. In August, 2005, she was again seen in the emergency room due to abdominal complaints. A chest x-ray was taken and it was recommended that the patient have a follow up CT scan of the chest/right lung. Once again, her primary care physician did not mention this report or order the recommended scan when she saw him in follow up to the emergency room visit.

In January, 2008, her primary care physician ordered a chest x-ray as part of a "welcome to Medicare physical." The chest x-ray revealed an infiltrate in her right lung and recommended follow up. Although her primary care physician received this report, he did not mention the report's findings to the patient or order the recommended follow up despite three further visits with the same physician in 2008.

Her primary care physician retired from practice and she saw another physician in July, 2009 who immediately told her of the earlier findings and ordered up follow up testing. The patient was subsequently diagnosed with Stage IV lung cancer and she underwent surgery, radiation and chemotherapy. In June, 2010, the Plaintiff served her primary care physician and his employer with a Notice of Intent arguing that the negligence commenced during the office visit in September, 2002. A complaint was subsequently filed and the Defendants raised the defense of the running of the statute of repose. The trial court agreed with the Defendants and granted summary judgment.

The Second District affirmed in part and reversed in part. In doing so, they noted that the statute of limitations begins to run when the cause of action accrues. By contrast, "a statute of repose, which is usually longer in length, runs from the date of the discrete act on the part of the Defendant without regard to when the case of action accrued…thus, in a medical malpractice case, it is the discrete incident of malpractice that triggers the running of the statute of repose."

The Second District found that the primary care physician committed three discrete acts of malpractice and that each act was subject to its own 4-year statute of repose. As a result, the 2002 act of malpractice was barred as of October, 2006. The 2005 malpractice was barred by the statue of repose as of October, 2009. The Court found, however, that the Plaintiffs were entitled to make a claim for the 2008 incident.

The Plaintiffs also argued that the court should have applied "the continuing tort doctrine" to the primary care physician's actions which would result in the statute of repose not beginning to run until after her final visit with the doctor in 2008. The Second District rejected this argument for two reasons. First, "the continuing tort doctrine" applies to statute of limitations; not statutes of repose." They added that no Florida court had ever applied the continuing tort doctrine to statutes of repose or to medical malpractice cases.

Secondly, the Second District stated that even if the continuing tort doctrine could be properly applied to statutes of repose in medical malpractice actions, it would not resuscitate the claims from 2002 and 2005 because "when a Defendant's damage-causing act is completed, the existence of continuing damages to the Plaintiff, even progressively worsening damages, does not present successive causes of action accruing because of a continuing tort."

Summary Judgment

Moody v. Lawnwood Medical Center, 125 So. 3d 246 (Fla. 4th DCA 2013)

The minor Plaintiff suffered a broken hip. She went to her pediatrician who made the diagnosis and recommended that the patient to go to Lawnwood Medical Center where the pediatrician had staff privileges. The patient was admitted to the hospital through the emergency department and the pediatrician was the admitting physician.

The parents filed suit against Lawnwood, the pediatrician and the orthopedist. Suit against Lawnwood was for direct liability, as well as, vicarious liability. The Plaintiffs settled their lawsuits with the pediatrician and the orthopedist and the hospital then sought summary judgment on the issue that the claims against Lawnwood for the actions of the pediatrician and the orthopedist were released. The trial court eventually entered partial summary judgment on the issue of the release.

The Fourth District reversed and found that the releases clearly did not release Lawnwood for its potential liability for the acts of the pediatrician and the orthopedist. Language included in the release documents stated that "this release does not release Lawnwood Medical Center, Inc…." Further, the releases state that Lawnwood was not released "from any claim that is or could be asserted" in the lawsuit and the Complaint which incorporated by reference into the settlement agreement and releases had alleged that Lawnwood was vicariously liable for the actions of the pediatrician and the orthopedist.

Trade Secrets

Gulf Coast Surgery Ctr., Inc. v. Fisher and Penney, 107 So. 3d 493 (Fla. 2d DCA 2013)

Penney was involved in an auto accident with Fisher. Penney was then treated at Gulf Coast. Penney filed suit against Fisher, and Fisher served a subpoena duces tecum seeking various financial documents from Gulf Coast which related to Penney's care. Gulf Coast filed a motion for protective order. The trial court ordered Gulf Coast to comply with the discovery requests.

The Second District granted Gulf Coast's Petition for Certiorari. The trial court failed to balance Fisher's need for the documents with Gulf Coast's privacy interest. Further, because Gulf Coast contended that these documents contained trade secrets, the trial court was required to perform an in-camera review to determine whether they were trade secrets. Moreover, when a court orders disclosure of trade secrets, it must take appropriate measures to protect the interests of the trade secret holder, the interest of the parties, and the furtherance of justice.
Cooper Tire and Rubber Company v. Guzman, 112 So. 3d 731 (Fla. 3d DCA 2013)

Cooper Tire petitioned for Writ of Certiorari to quash an Order compelling production of documents Cooper claimed were protected from discovery by the trade secret privilege. The Personal Representative sued Cooper for the negligent

design and manufacture of its tires. Cooper objected to a number of discovery requests on grounds that the requested documents were protected by the trade secret privilege and filed those documents with the Court for an in-camera inspection. At the same time, Cooper filed a Motion for Protective Order of Confidentiality pertaining to the privileged documents.

At the hearing for the Motion for Protective Order and Guzman's respective Motion to Compel, the trial court ordered that all documents already produced by Cooper for *in camera* inspection were relevant, subject to discovery, and were to be produced. The court also granted Cooper's Motion for Protective Order finding that the documents the Court ordered produced shall be subject to the protection.

If a court orders production of a trade secret, it must first demonstrate the reasonable necessity of the production and set forth its findings on why reasonable necessity has been demonstrated. Applying this standard, the Third District granted Certiorari, quashed the Order compelling production of the documents and remanded with instructions to the trial court to follow this standard. The Third District noted that, while the trial court limited the scope of the production of the trade secret documents by granting Cooper's Motion for Protective Order and authorized disclosure of the confidential materials only to persons in connection with the trial preparation in this case, it failed to set forth in its order the required findings as to why the production of such documents was reasonably necessary.

Work Product

International House of Pancakes (IHOP) v. Robinson, 124 So. 3d 1004 (Fla. 4th DCA 2013)

In a claim stemming from Robinson finding a severed fingertip in a salad served at an IHOP restaurant, the trial court ordered production of a statement taken from the prep cook whose fingertip was in the salad. The Fourth District granted certiorari, holding that the statement was prepared in anticipation of litigation and not in the normal course of business. The Fourth District noted that it was well known that people injured on business premises try to be compensated for their injuries. Thus, the statement to IHOP's insurer was taken in anticipation of reasonable foreseeable litigation.

Moreover, Robinson did not demonstrate a "need" to overcome the work product privilege based on their claim that the prep cook had made multiple prior inconsistent statements about the extent of his finger injury. The courts have

uniformly rejected the notion that a party can overcome a work product privilege merely because of the possibility of generating multiple contradictory statements for use as impeachment.

Rocca v. Rones, 125 So. 3d 370 (Fla. 3d DCA 2013)

In a case involving a business dispute, Plaintiff's counsel hired an accounting expert to review records and form an expert opinion regarding the amount of the Plaintiff's damages, as well as, to assist him in the preparation of the case. This expert was initially placed on Plaintiff's list of testifying witnesses, however when the Defendants notified the Plaintiff that they intended to depose the expert, he was removed from the witness list.

The Plaintiff then amended the witness list by adding an accounting expert who was going to testify at trial. Nevertheless, the Defendants argued to the trial court that they needed to depose the first expert because they had no other way of calculating the potential damages. The trial court issued an order requiring that the first expert be deposed, but only as a non-expert fact witness. The expert was deposed and the Defendants inquired on privileged issues, as well as, methods and calculations of the damages the experts had formulated based on the information provided by the Plaintiff. The Defendants then moved to compel in requiring the Plaintiff's attorney to show cause why he should not be held in contempt for refusing to comply with the earlier court order.

The trial court granted both motions and the Plaintiff then filed a Petition for Writ of Certiorari. The Third District granted the petition citing to rule 1.280 of the Florida Rule of Civil Procedure and also noting that "when an expert has been specially employed in preparation of litigation but is not to be called as a witness at trial, the facts known or opinions held are deemed to be work product and may be discovered only by showing of exceptional circumstances, as mandated by Rule 1.280."