2016
CASE LAW SUMMARY

Procedural and Legal Issues

Affidavit cannot contradict prior testimony to defeat summary judgment

Lesnik v. Duval Ford, LLC, 185 So. 3d 577 (Fla 1st DCA 2016)

Plaintiff sued an automobile dealer that sold a truck with a lift kit installed to the initial purchaser who then who subsequently sold the truck to the Plaintiff who was injured when the truck's steering and suspension failed resulting in the truck flipping over. Defendant moved for Summary Judgment and, following the filing of the motion, the Plaintiff's expert witness filed an Affidavit which expressed an opinion that the dealer who sold the truck to the Plaintiff failed to take action which could have prevented the accident. In the witness's prior deposition testimony he stated that he had no opinion regarding the conduct of the Defendants. The First District affirmed the granting of the Summary Judgment citing the long standing rule that a litigant, when confronted with an adverse Motion for Summary Judgment, may not contradict or disavow prior sworn testimony with contradictory sworn affidavit testimony. Here, the witness's affidavit was inconsistent with his earlier deposition testimony and there was no explanation given for the inconsistency.

Attorney's fees

Tedrow v. Cannon, 186 So. 3d 43 (Fla. 2d DCA 2016)

The Plaintiff claimed injuries following a dog bite. In this case, the owner had displayed the statutorily required "bad dog" sign thereby relieving him from strict liability. The Defendant served the Plaintiff with a Motion for Attorney's Fees under Florida Statute 57.105. 21 days passed, but then ultimately Plaintiff filed a Notice of Dismissal. The Second District ruled that the Defendant was entitled to fees because the 21-days had passed before the time the Plaintiff voluntarily dismissed the case. The court prohibited the Defendant, however, from using any privileged information between the Plaintiff and her counsel to prove entitlement to fees.

Public Health Trust of Miami-Dade County v. Denson, 189 So. 3d 1013 (Fla. 3d DCA 2016)

In this medical malpractice case, the Defendant doctor had conversations with witnesses within ear shot of jurors on two separate occasions. Ultimately, the trial court granted a Motion for Mistrial. The Plaintiff then moved for sanctions seeking $49,000 in attorney's fees representing the time preparing for the first trial. The trial court denied the motion without prejudice. A second trial resulted in a mistrial due to a shortage of potential jurors. A year later, the third trial went forward to conclusion. The Plaintiff then renewed her Motion for Sanctions and sought $238,000 in preparation for all three trials.

The trial court awarded $208,000 in fees finding that the Plaintiff was not entitled to recover fees for the second trial, but she was allowed to recover fees for the first and third trials. The trial court specifically found that the Defendant physician had engaged in a pattern of behavior that reflected a total disregard for and disrespect to the court and that such misconduct was supported by the record.

The Third District upheld the decision to award sanctions, however, it found that the trial court abused its discretion in awarding attorney's fees beyond that necessary to compensate the Plaintiff for the preparation and conduct of the first trial. The Third District found that the time spent for the second and third trials did not directly relate to the Defendant's misconduct and therefore remanded to the trial court for entry of an award consistent with the time spent in preparation for and attendance at the first trial.

Paton v. GEICO General Insurance Company, 190 So. 3d 1047 (Fla. 3/24/16)

Following a bad faith verdict, Plaintiff moved for attorney's fees and costs. The Plaintiff sought discovery related to the time records of the Defendant's attorneys including: (1) any and all timekeeping slips and records regarding time spent defending GEICO in the bad faith action; (2) any and all bills, invoices, and/or other correspondence for payment of attorney's fees for defending GEICO in the bad faith action; and, (3) any and all retainer agreements. GEICO objected to the request arguing that the information was privileged and irrelevant. The trial court overruled GEICO's objections to this discovery and the Fourth District granted certiorari and quashed the trial court's order. The Supreme Court quashed the Fourth District's decision and held "that the hours expended by counsel for the Defendant insurance company in a contested claim for attorney's fees filed pursuant to §624.155 and §627.428, Florida Statutes, is relevant to the issue of the reasonableness of time expended by counsel for the Plaintiff, and discovery of such information, where disputed, falls within the sound discretion of the trial court."

Mahany v. Wright's Healthcare & Rehabilitation Center, 194 So. 3d 399 (Fla. 2d DCA 2016)

The Plaintiff sought certiorari review following the trial court's order denying her petition for approval of an attorney's fee contract which would have awarded her attorney 40% of the total settlement from her negligence claim against Wright's Healthcare. The Plaintiff filed her Complaint after having already reached a settlement. After the settlement, the Plaintiff's attorney sent a letter to the trial court seeking approval for the increased fee. In the petition, the Plaintiff waived any right or opportunity to be heard. The trial court denied the excess fee and Plaintiff's counsel contended that the Circuit Court departed from the essential requirements of law in failing to apply the provisions of Rule 4-1.5 of the rules regulating the Florida Bar which requires the court to approve a fee agreement where the client shows she understands her rights.

The Second District denied certiorari. The court emphasized that the rule requires the trial court to determine whether the client understands her right to have the fee limitations applied to her case and the District Court believed that this was not possible without an evidentiary hearing. The waiver of this right in a sworn petition for approval of the attorney's fee contract deprived the trial court of the ability to assess the client's competence, understanding and willingness to waive such a right and added that the better practice was to present the client before the court to allow the court to assess her understanding of her rights and to confirm that she made a knowing and intelligent waiver under the rule.

Case not at issue

Melbourne HMA, LLC v. Schoof, 190 So. 3d 169 (Fla. 5th DCA 2016)

The Fifth District granted mandamus finding that the trial court erred by setting a case for trial before it was at issue. In this case, the last pleading in the case was filed on March 14, 2016 and the case was not at issue pursuant to Rule of Civil Procedure 1.440 until April 4, 2016. Thereafter, the trial court should have filed an order setting the case for trial at least 30 days out, to-wit: May 4, 2016. As such, it was error to set the matter for trial on April 25, 2016.

Cell phone records may violate Fifth Amendment

Restrepo v. Carrera, 189 So. 3d 1033 (Fla. 3d DCA 2016)

The trial court directed the petitioner to provide cell phone numbers and/or names of providers used during the six hour period before the time of a motor vehicle accident and the six hour period after the accident. The Respondent conceded and the Third District agreed that the trial court's order directing the Petitioner to reveal information regarding her cell phone violates her Fifth Amendment rights and constituted a departure from the essential requirements of law and, therefore, granted certiorari.

Certiorari

Shindorf v. Bell, 42 FLWD 70 (Fla. 2d DCA 12/28/16)

The Second District granted certiorari and held that the trial court departed from the essential requirements of the law in entering a protective order which prevented the Plaintiffs from taking the deposition of a Defendant on the basis that the Defendant had previously been deposed as a fact witness by Plaintiffs' counsel in a separate lawsuit against different Defendants concerning the same underlying incident. In doing so, the court noted that the trial court's ruling underminded a fundamental tenet of civil discovery practice - - to ascertain the strengths and weaknesses of an adversary's pleaded claims or defenses.

Toomey v. The Northern Trust Company, 182 So. 3d 891 (Fla. 3d DCA 2016)

In an action regarding construction of a Trust Agreement, the trial court issued a protective order preventing the deposition of two witnesses who had direct conversations with the Settlor regarding his intentions and the execution and administration of the trust despite the fact that both witnesses were in their 70's and one of the witnesses suffered from end-stage chronic obstructive pulmonary disease and emphysema. The Third District granted certiorari and held that denial of leave to perpetuate testimony by a terminally ill person is a matter which may be entertained by a Petition for Writ of Certiorari.

State Farm Mutual Automobile Insurance Company v. Premier Diagnostic Centers, LLC, 185 So. 3d 575 (Fla. 3d DCA 2016)

State Farm filed a Petition for Writ of Certiorari in order to quash three trial court orders which required them, in three first-party non-bad-faith cases, to produce portions of its claim files to a medical care provider. The Third District granted certiorari holding than an insurer's claim file is not discoverable in cases

such as this and found that the trial court not only applied the wrong law; but also that there would be an irreparable departure from the essential requirements of the law resulting in a manifest injustice to State Farm.

Espinosa v. D.H. Griffin Construction Company, 187 So. 3d 1273 (Fla. 3d DCA 2016)

The Third District granted certiorari and found that the trial court departed from the essential requirements of law in granting a motion for psychiatric examination of party without properly determining that there was good cause for the examination. In doing so, the Third District noted that the trial court is required to determine the scope of the requested examination before making the good cause determination.

In this case, the request for psychiatric examination indicated that the psychiatrist would "make such examination or tests, including written tests, completing health forms, the Minnesota Multi-Phase Inventory (MMPI), and interview…, as may be necessary to ascertain the extent of the psychiatric condition." The Third District stated that "if the trial court does not know the particular examinations that the psychologist plans to conduct, it should not grant the request and that in order to determine whether good cause exists for ordering the examination, the court must note the particular examination that the psychologist intends to conduct."

Doctors Company v. Thomas, 189 So. 3d 196 (Fla. 2d DCA 2016)

The Doctors Company filed a Petition for Writ of Certiorari to review a discovery order that had denied its Motion for Protective Order and compelled production of their claims file and other investigative documents prior to any insurance coverage determination. The Second District granted certiorari finding that the trial court's order departed from the essential requirements of the law and would result in irreparable harm that could not be remedied on appeal.

Restrepo v. Carrera, 189 So. 3d 1033 (Fla. 3d DCA 2016)

The trial court directed the petitioner to provide cell phone numbers and/or names of providers used during the six hour period before the time of a motor vehicle accident and the six hour period after the accident. The Respondent conceded and the Third District agreed that the trial court's order directing the Petitioner to reveal information regarding her cell phone violates her Fifth

Amendment rights and constituted a departure from the essential requirements of law and, therefore, granted certiorari.
Rosen v. McCobb, 192 So. 3d 576 (Fla. 4th DCA 2016)

Following an altercation, the Plaintiff filed a personal injury action alleging claims for assault and intentional/negligent infliction of severe emotional distress. The Defendant counterclaimed for unjust enrichment and civil battery and the trial court subsequently granted a Motion for Leave to Add a Punitive Damages Claim. Part of the list of items requested from the Defendant would have caused her to disclose financial information related to her non-party husband. The Fourth District held that it was improper to order production of financial information of a non-party.

Mahany v. Wright's Healthcare & Rehabilitation Center, 194 So. 3d 399 (Fla. 2d DCA 2016)

The Plaintiff sought certiorari review following the trial court's order denying her petition for approval of an attorney's fee contract which would have awarded her attorney 40% of the total settlement from her negligence claim against Wright's Healthcare. The Plaintiff filed her Complaint after having already reached a settlement. After the settlement, the Plaintiff's attorney sent a letter to the trial court seeking approval for the increased fee. In the petition, the Plaintiff waived any right or opportunity to be heard. The trial court denied the excess fee and Plaintiff's counsel contended that the Circuit Court departed from the essential requirements of law in failing to apply the provisions of Rule 4-1.5 of the rules regulating the Florida Bar which requires the court to approve a fee agreement where the client shows she understands her rights.

The Second District denied certiorari. The court emphasized that the rule requires the trial court to determine whether the client understands her right to have the fee limitations applied to her case and the District Court believed that this was not possible without an evidentiary hearing. The waiver of this right in a sworn petition for approval of the attorney's fee contract deprived the trial court of the ability to assess the client's competence, understanding and willingness to waive such a right and added that the better practice was to present the client before the court to allow the court to assess her understanding of her rights and to confirm that she made a knowing and intelligent waiver under the rule.

TRG Desert Inn Venture, Ltd. v. Berezovsky, 194 So. 3d 516 (Fla. 3d DCA 2016)

The trial court granted Plaintiff's Motion for Leave to Add a Claim for Punitive Damages. The Third District denied certiorari. In doing so, they stated that certiorari is the appropriate remedy to challenge a trial court's order allowing punitive damages when the essential requirements of law, as embodied in Florida Statute §768.72, have not been followed. Thus, certiorari can be granted when the record establishes that a trial court applied the incorrect law. In this case, at most, the trial court incorrectly applied the correct law and this is not reviewable by certiorari.

Coffey-Garcia v. South Miami Hospital, Inc., 194 So. 3d 533 (Fla. 3d DCA 2016)

On July 16, 2005, the Plaintiff gave birth to her daughter. In early 2007, a neurologist diagnosed the baby with cerebral palsy. Prior to the child's 8th birthday, the Plaintiff's filed a Petition to Extend the Statute of Limitations for 90 days. Thereafter, they filed a Notice of Intent and, in November, 2013, the Plaintiff filed suit.

During discovery, the Defendants questioned the mother regarding when she consulted attorneys and why she consulted them. After testifying that her current counsel was not the first attorney she consulted, she declined to answer any other questions based upon the attorney-client privilege. The Defendants moved to compel these answers and the trial court ordered the Plaintiff to answer all questions regarding when she first sought legal counsel, the names of the attorneys who she consulted with and the reasons why she first sought out legal counsel and any subsequent counsel. At oral argument, the Defendants conceded that any information produced should be limited to consultations regarding possible legal remedies stemming from the daughter's condition.

The Third District granted certiorari in part but ordered that the Plaintiff reveal when and with whom she consulted for the general purpose of discussing possible legal remedies stemming from her daughter's condition. The Third District granted certiorari as to that portion of the order which required the Plaintiff to "answer all questions related to…the reasons why she first sought out legal counsel and any subsequent counsel" because this part of the order would allow inquiry into confidential communications between her and her attorneys including "after consulting the first lawyer, why did you seek out a second lawyer?" The court explained that this would require her to provide responses such as "my first lawyer insisted I had no case so I wanted to get a second opinion," or "my first lawyer told me I had an excellent case but needed a lawyer specializing in neonatology."

Insurance Co. of State of Pennsylvania v. Ramirez, 195 So. 3d 395 (Fla. 4th DCA 2016)

The Defendant sought to join another individual involved in an automobile accident as an indispensable party to the claim. The trial court denied the motion and the Fourth District denied certiorari finding that it was not a departure from the essential requirements of law to deny consolidation of two claims arising out of the same accident.

Tenet Hialeah Healthsystem, Inc. v. Gonzalez, 196 So. 3d 511 (Fla. 3d DCA 2016)

The hospital sought certiorari review of the trial court's order allowing the Plaintiff to amend their Complaint to allege punitive damages in an action for mishandling of a minor's corpse. The Third District stated that it could not review an order authorizing a claim for punitive damages beyond determining whether the trial court followed the procedural requirements and having found that the trial court did so, they denied the Petition for Certiorari.

HCA Health Services of Florida, Inc. v. Byers-McPheeters, 201 So. 3d 669 (Fla. 4th DCA 2016)

The Fourth District granted certiorari and held that the trial court departed from the essential requirements of law by allowing the Plaintiffs to plead a claim for punitive damages without first determining whether the Plaintiffs' proffer established a reasonable basis for recovery pursuant to Florida Statute §768.72(3).

Consolidation of claims

Insurance Co. of State of Pennsylvania v. Ramirez, 195 So. 3d 395 (Fla. 4th DCA 2016)

The Defendant sought to join another individual involved in an automobile accident as an indispensable party to the claim. The trial court denied the motion and the Fourth District denied certiorari finding that it was not a departure from the essential requirements of law to deny consolidation of two claims arising out of the same accident.

***Daubert* standard properly excluded testimony**

Bunin v. Matrixx Initiatives, 197 So. 3d 1109 (Fla. 4th DCA 2016)

The Plaintiff claims that she lost her sense of smell after using a nasal spray manufactured and sold by the Defendants. The Defendants moved to exclude the opinion of the Plaintiff's causation expert based upon the 2013 Amendment to Florida Statute §90.702 which adopted the *Daubert* standard. The trial court granted the Defendants' motion and entered Summary Judgment in favor of the Defendants. The Fourth District affirmed finding that the trial court did not abuse its discretion in excluding this causation testimony because the amendments to the statute were procedural and therefore could be applied retroactively. At the same time, the Fourth District noted that the Plaintiff did not raise the argument that the 2013 Amendments to the statute violated the separation of powers doctrine by encroaching upon the Florida Supreme Court's authority to adopt procedural rules in Florida's Courts.

Default properly entered

Santiago v. Maura Loa Investments, 189 So. 3d 752 (Fla. 2016)

Following entry of a default judgment against an alleged land owner, the District Court of Appeal reversed based upon documents attached to a Complaint in a separate lawsuit regarding the same incident. In doing so, the District Court stated that the trial court had no discretion but to set aside the default because the Defendant did not own, control or maintain the property on the date of the Plaintiff's injury.

The Supreme Court quashed the decision of the Third District reemphasizing the long standing rule that the sufficiency of a Complaint to state a cause of action must be determined solely by examination of the Complaint and its related attachments and that the court cannot look beyond the four corners of the Complaint. Further, the Supreme Court held that the trial court properly denied the Motion to Set Aside Default finding that the Defendant did not establish excusable neglect even though the President/Resident Agent of the company promptly delivered the Complaint to counsel, called his attorney's office thereafter and was assured by his attorney's secretary that the matter was being handled. As the Supreme Court stated "after one call to her attorney's office, the company's President took no further action to assure a timely response that the Complaint was filed. Accordingly, the trial court did not abuse its discretion by entering a default."

Denial of perpetuating testimony in error

Toomey v. The Northern Trust Company, 182 So. 3d 891 (Fla. 3d DCA 2016)

In an action regarding construction of a Trust Agreement, the trial court issued a protective order preventing the deposition of two witnesses who had direct conversations with the Settlor regarding his intentions and the execution and administration of the trust despite the fact that both witnesses were in their 70's and one of the witnesses suffered from end-stage chronic obstructive pulmonary disease and emphysema. The Third District granted certiorari and held that denial of leave to perpetuate testimony by a terminally ill person is a matter which may be entertained by a Petition for Writ of Certiorari.

Denial of Summary Judgment is not appealable

Taival v. Barrett, 204 So. 3d 486 (Fla. 5th DCA 2016)

The trial court denied the Defendant's Motion for Summary Judgment on the issue of sovereign immunity. The Fifth District held that an order that denies Defendant's Motion for Summary Judgment, but does not determine as a matter of law that Summary Judgment is improper is not appealable.

Fourth Amended Complaint properly dismissed

Gerstein v. International Asset Value Group, LLC, 199 So. 3d 979 (Fla. 4th DCA 2016)

The trial court dismissed a Fourth Amended Complaint with prejudice for failure to state a cause of action and the Fourth District affirmed. "Although there is no magical number of amendments which are allowed, dismissal of a Complaint that is before the Court on a third attempt of improper pleading is generally not an abuse of discretion." In this case, the Plaintiff was given four separate opportunities to amend the Complaint to state a cause of action, yet failed to do so each time.

Fraud on the Court

Diaz v. Home Depot USA, Inc., 196 So. 3d 504 (Fla. 3d DCA 2016)

The Plaintiff sued Home Depot alleging that she was injured when a fire extinguisher fell from the wall above her and hit her in the neck and shoulder. She alleged she suffered permanent injuries to her neck and shoulder. During the course of pretrial discovery, including a deposition, the Defendant questioned the Plaintiff about her injuries, as well as, whether she suffered any prior neck or shoulder injuries. At each point, Diaz denied that she previously suffered any injury to her neck or back and denied that she was ever involved (either before or after the Home Depot incident) in a slip and fall accident or motor vehicle accident that required medical treatment.

After obtaining the Plaintiff's medical records, the Defendant discovered that just nine months prior to this incident, she had been involved in a motor vehicle accident, was placed in a cervical collar, and was transported by ambulance to an Emergency Department where she received treatment. On arrival at the Emergency Department, she complained of, amongst other things, pain to her neck and upper back. She described her pain level there as 10/10. Additionally, the medical records revealed that, less than seven months before the Home Depot incident and just two months after the above-described accident, she visited the Emergency Department again complaining of neck pain and back pain. The medical history reflects that the Plaintiff stated she passed out two days earlier, fell backwards and hit concrete. She complained of throbbing pain to the neck and sharp pain to the back and described her pain level as 8/10.

Additionally, the medical records revealed that eight months after the Home Depot incident, and less than two months after filing the lawsuit against Home Depot, she was involved in a single car accident which required her to go to the hospital. According to the history provided by the Plaintiff, the accident occurred two weeks earlier. Apparently, she was driving a car at 120 miles per hour when it struck a divider and spun several times. The windshield on her car broke and there was a prolonged extraction of her. She was not wearing a seatbelt, but was not ejected from the vehicle. She described her pain level as 10/10. She also told the nurse that she had had chronic neck pain since 2009. The Third District affirmed the trial court's dismissal of the Complaint for fraud on the court finding no abuse of discretion even when taking into account the heightened standard of "clear and convincing evidence" which is required to dismiss an action for fraud on the court.

Cal v. Forward Air Solutions, Inc., 199 So. 3d 312 (Fla. 3d DCA 2016)

The Plaintiff was injured in an automobile accident in 2011. She later claimed that she had injured her lower back and neck in a prior slip and fall in

2010 and that the 2011 accident had exacerbated her injuries. The trial court compelled the Plaintiff to attend a compulsory medical examination and also entered an order requiring her to produce documents related to the settlement of the slip and fall case and to provide better responses to Interrogatories regarding its settlement. The Plaintiff failed to attend the examination and the Defendants moved for sanctions, including dismissal of the case. Defendants argued that the Plaintiff not only failed to attend the medical examination and comply with the orders compelling better responses, but also provided false testimony regarding her medical history in her depositions and her false answers in Interrogatories.

After conducting two hearings on the matter, the trial court entered another order granting the Defendants' Motion for Sanctions and Dismissing the Case with Prejudice. The trial court's detailed order found that the Plaintiff had been involved in a prior accident in May, 2008 that resulted in injuries to her shoulder and back. Because she had received treatment for the injuries at a facility that had gone out of business, it was not possible to get the records from the facility and therefore there was no way to corroborate her claim. The court also found that the Plaintiff had lied under oath several times when answering questions in two depositions and two sets of Interrogatories by failing to disclose that accident, as well as, the injuries or treatment for them. The trial court finally found that the Plaintiff had willfully violated its court order by failing to produce discovery and attend the medical examination. The Third District affirmed finding that the trial court did not abuse its discretion in dismissing the claim. The Third District pointed out that this was "not a single moment of forgetfulness that this trial court witnessed in the Plaintiff's Answers to Interrogatories and her deposition testimony. Here, the Plaintiff consistently provided answers that were either incomplete or intentionally omitted significant information."

IME's

Espinosa v. D.H. Griffin Construction Company, 187 So. 3d 1273 (Fla. 3d DCA 2016)

The Third District granted certiorari and found that the trial court departed from the essential requirements of law in granting a motion for psychiatric examination of party without properly determining that there was good cause for the examination. In doing so, the Third District noted that the trial court is required to determine the scope of the requested examination before making the good cause determination.

In this case, the request for psychiatric examination indicated that the psychiatrist would "make such examination or tests, including written tests, completing health forms, the Minnesota Multi-Phase Inventory (MMPI), and interview…, as may be necessary to ascertain the extent of the psychiatric condition." The Third District stated that "if the trial court does not know the particular examinations that the psychologist plans to conduct, it should not grant the request and that in order to determine whether good cause exists for ordering the examination, the court must note the particular examination that the psychologist intends to conduct."

Impact Rule

G4S Secure Solutions USA, Inc. v. Golzar, 41 FLWD 2514 (Fla. 3d DCA 11/9/16)

A security company was sued for emotional distress alleging that it negligently hired, retained and supervised its employee who recorded a video of the Plaintiff while she was undressed. The trial court entered a judgment in favor of the Plaintiff and the Third District reversed because the impact rule precludes recovery of purely non-economic damages for emotional distress for the tort of negligent hiring, retention/supervision absent any physical injury. Further, the employee's intentional conduct did not merge with the employer's negligent conduct and therefore the employer was not vicariously liable for the intentional torts of its employee.

Improper denial of amendment to Complaint

Faber v. Karl of Pasco, Inc., 198 So. 3s 875 (Fla. 2d DCA 2016)

The Second District ruled that the trial court abused its discretion in denying the Plaintiff's Motion for Leave to Amend the Compliant to allege a new version of events on the ground that the amendment would be futile even though the Complaint alleged a version of events that differed from the version presented in Plaintiff's deposition, because the supporting Affidavit appropriately explained or clarified her prior deposition in light of the deposition testimony of others which also clarified the sequence of events leading to the Plaintiff's injuries.

Medicare/Medicaid Liens

Humana Medical Plan v. Western Heritage Insurance Company, 2016 WL 4169120 (11th Cir. 8/8/2016)

Humana operates a Medicare Advantage Plan. One of its members was injured at the Hamptons West Condominium. She sought medical treatment for her injuries and her medical providers billed Humana. Humana paid a total of $19,155.41. Thereafter, the member and her husband sued the association. Humana issued an Organization Determination in the amount of $19,155.41. The basis for the reimbursement request was the Medicare Secondary Payer Act. No party appealed Humana's Organization Determination.

The member and her husband subsequently settled their claim against the condominium and released the condominium and Western Heritage as its insurance company. The Plaintiffs represented in the settlement agreement that there was no Medicare or other lien or right to subrogation but also agreed to indemnify Hamptons West and Western against any Medicare or other lien or right to subrogation.

Thereafter, Humana sued Plaintiffs and their attorney seeking reimbursement. A Motion to Dismiss was filed claiming that a Medicare Advantage Plan does not have a private cause of action to recover reimbursement from a beneficiary under the Medicare Secondary Payer's Act. Eventually, Humana voluntarily dismissed its action. Thereafter, Western and Hamptons West attempted to make Humana a payee on the settlement draft. The Plaintiffs refused and sought sanctions against Hamptons West for failing to comply with the settlement agreement. Thereafter, Hamptons West agreed to a stipulated order under which Humana would not be a payee on the check, but that the Plaintiffs' attorney would hold $19,155.41 in trust pending resolution of the litigation. Based upon this, Hamptons West and Western tendered the settlement check.

Subsequently thereto, the Plaintiff sued Humana in State Court seeking a declaration as to the amount they owed Humana. The trial court held that Humana was held to $3,685.03. Humana appealed and the Third District Court of Appeal reversed for lack of jurisdiction. Having failed to secure reimbursement from Plaintiff, Humana demanded that Western reimburse Humana's secondary payment. Eventually, the U.S. District Court granted Summary Judgment in favor of Humana finding that the Medicare Secondary Payer Act's private cause of action was available to a Medicare Advantage Plan and, further, that Humana was entitled to double damages. The 11th Circuit Court of Appeal affirmed despite the fact that the Plaintiffs' lawyer was holding Humana's money in trust pending a trial court's decision. The 11th Circuit pointed out that "if a beneficiary or other party fails to reimburse Medicare within 60 days of receiving a primary payment,

the primary plan 'must reimburse Medicare even though it has already reimbursed the beneficiary or other party.'…This regulation applies equally to a [Medicare Advantage Plan]."

Giraldo v. Agency for Healthcare Administration, 41 FLWD 2743 (Fla. 1st DCA 12/12/16)

AHCA claimed a lien in the amount of $324,607.25 for medical expenses incurred by the Plaintiff who suffered a catastrophic spinal injury when his ATV overturned. A month after AHCA asserted its lien, the Plaintiff settled its case against one of the Defendants. The settlement agreement between the two parties did not itemize the different sums that he was to recover for each element of damage that he claimed but did state that the Plaintiff's alleged damages had a value in excess of $25,000,000 and that the Plaintiff and the settling Defendant had agreed to allocate $4,817.56 of the settlement to his claim for past medical expenses. Plaintiff's counsel later testified that this amount was a mathematical error and that the correct sum was $13,881.79 and that this amount was to represent that the settling Defendant paid only 4% of the total damage amount claimed and therefore they allocated 4% of the recovery to the past medical expenses.

Shortly after settling, the Plaintiff's counsel notified AHCA about the settlement and provided it with a copy of the executed Settlement Agreement along with an itemization of the litigation costs. The letter asked ACHA to advise the Plaintiff of the amount that AHCA would accept from the settlement proceeds to satisfy its lien. AHCA claimed entitlement to $321,720.16 of the settlement predicated on its calculation of the amount payable pursuant to the formula set forth in Florida Statue 409.910(11)(f).

The Plaintiff then filed a Petition with the Division of Administrative Hearings for a formal proceeding to contest the amount designated by AHCA as recovered medical expense damages. The Administrative Law Judge properly found that AHCA was entitled to a recovery based upon the statutory formula and, further, it was entitled to reimbursement for payments already made for medical costs not only from that portion of the settlement allocated for past medical expenses, but also from that portion of the settlement intended as compensation for future medical expenses.

Hernandez v. Agency for Healthcare Administration, 190 So. 3d 139 (Fla. 3d DCA 2016)

In this wrongful death case, the Estate settled with the alleged tortfeasor prior to filing suit. The written settlement agreement did not apportion the moneys between the Estate and its survivors. Medicaid had previously paid $409,676.36 and claimed a lien against the $700,000 settlement. The Estate filed a petition in probate court to determine the proper amount of the Agency's lien. The petition requested that the court apportion $500,000 to cover the survivor's wrongful death statutory damages with the remaining $200,000 apportioned for the Medicaid lien and other economic damages incurred by the Estate including attorney's fees. In response, the Agency argued that, under the formula in Florida's Medicaid Third-Party Liability Act, it was entitled to payment of $262,500. The Estate disagreed citing to the U.S. Supreme Court's decision in *Arkansas v. Ahlborn*, 547 U.S. 268 (2006) contending that the Federal Medicaid act's anti-lien provision preempted Florida's Medicaid Third-Party Liability Act.

In this case, of first impression involving a lien on a wrongful death settlement, the Third District looked at the plain language of the Federal anti-lien statute which explicitly states that "no lien may be imposed against the property of any individual prior to his death on account of medical assistance…" The Third District agreed that this language clearly reflected Congress' intent to apply the anti-lien provision only to living Medicaid recipients. As such, the Third District concluded that because this case involved the lien in a wrongful death case, *Ahlborn* and the other cases regarding Medicaid liens did not apply. Instead, the court held that its decision in *Ross v. Agency for Healthcare Administration,* 947 So. 2d 457 (Fla. 3d DCA 2006) applied and that the Agency had to paid in accordance with Florida's Medicaid Third-Party Act.

Goheagan v. Perkins, 197 So. 3d 112 (Fla. 4th DCA 2016)

Swaby who was severely injured in a car accident, suffered significant injuries and ultimately died after being in a coma for three months. Medical expenses totaled close to $1,000,000 of which Medicaid paid $95,000. Swaby's Estate brought a wrongful death action against the driver which resulted in a multi-million dollar verdict at trial. After final judgment was entered, the Estate brought a third party bad faith claim against the driver's automobile insurance carrier and eventually settled the case for $1,000,000. The Agency for Healthcare Administration then asserted a lien for the full $95,000 against the settlement proceeds of the bad faith claim based upon Florida Statute §409.910(11)(f).

The Estate moved for equitable distributions to reduce the Medicaid lien arguing that this portion of the statute was preempted by Federal law. The Estate also argued that the amount Medicaid paid was only 3.5% of the jury's verdict and, as such, asserted that the lien should be reduced to an amount equal to 3.5% of the actual settlement proceeds. The Fourth District concluded that the plain language of the Federal Medical law clearly reflected Congress's intent that the anti-lien provision should apply only to living Medicaid recipients. Therefore, because this was a wrongful death case, the anti-lien statute did not apply and it affirmed the trial court's decision in refusing to reduce the Medicaid lien.

Minor settlements

Allen v. Montalvan, 201 So. 3d 705 (Fla. 2016)

Three minor children were passengers in an automobile that was involved in an accident with the Defendant. The driver of the automobile, the grandmother of two of the children and the mother of the third, was killed in the crash. The other passengers, including the mother and another minor, suffered varying degrees of injury. Within two days of the accident, the mother entered into an agreement with a law firm to represent herself and her family members, including the children, injured in the accident. The firm sent a letter to the Defendants' insurance carrier and determined that the Defendants had coverage of up to $25,000/$50,000. The representative of the insurance company and Plaintiff's counsel spoke about the claims and the details of their conversation are disputed.

The insurance company representative claims she told the attorney that the insurance company would be "globally tendering our policy limits to extinguish all bodily injury claims." The adjuster recalled that the attorney requested two checks for $25,000 each be made payable to the firm's trust account. One check would be used to settle the wrongful death claim with the grandmother's Estate, while the remaining $25,000 was to settle the claims of the five surviving passengers. The adjuster stated that how the law firm chose to divide the monies between these remaining Claimants was left to their discretion and sent release forms to be signed by the mother on behalf of the grandmother's Estate, herself, and the four minors. Because of the uncertainty of how the funds were going to be allocated, the insurance company left the amounts in each release blank for the lawyers to fill in.

The Plaintiff's attorney stated that while he considered the $25,000 and release naming the deceased grandmother to be a settlement of the wrongful death claim, he did not consider the second $25,000 and releases for the other parties to

be a settlement, but rather considered it as an "insurance tender." Approximately two years after the checks were deposited into the law firm's trust account; the lawyers sent the completed releases back to the insurance company with each release signed by the mother and a witness. Each release was accompanied by a letter stating that it was a "release of all claims with regard to the settlement of the above-referenced claim." The blank amounts on the releases were filled in with the mother's claim stating it was released for $25,000, while all the minor's claims showed consideration in the amount of zero dollars. No one claims to have knowledge as to who filled in the blanks, although the figures were apparently added while the documents were in the possession of Plaintiff's counsel.

Approximately two weeks after returning the releases, the mother (represented by new attorneys) filed a Complaint against the Defendants. The Defendants answered the Complaint and raised a number of Affirmative Defenses including that the claims were barred by settlement or accord and satisfaction arising from the prior release, as well as contributory negligence on the part of the mother and deceased driver. The trial court subsequently found that the parties had entered into a binding settlement agreement and dismissed the children's claims.

The Fourth District reversed because the settlement involved minors and totaled $50,000 or more, the trial court was required to appoint a *guardian ad litem* to represent the children's interests before approving the settlement that disposed of their claims. The Fourth District also found that there was no merit to the argument that the $25,000 used to settle the claim of the deceased driver should be excluded from the computation of the gross settlement, because the evidence established that the insurance company globally tendered $50,000 in policy limits to settle all claims.

Motion to Dismiss

Nelson v. Hillsborough County, 189 So. 3d 1037 (Fla. 2d DCA 2016)

In this trip and fall case, the Complaint alleged that the Plaintiff had notified the Defendant as required by Florida Statute 768.28 on three separate occasions and also alleged that the Department of Insurance was notified. The Count argued in its Motion to Dismiss that the Complaint failed to allege compliance with the requirements to notify the Department of Financial Services and that the Plaintiff did not attach any documentation to prove such compliance to the Complaint. At the hearing on the Motion to Dismiss, the court asked the Plaintiff's attorney if she had any proof that timely notice was sent. Plaintiff's counsel stated that she had

properly plead compliance and therefore was not required to produce such proof. In response to repeated questioning, she still was unable to produce a copy of the letter and, therefore, the trial court dismissed the case with prejudice and entered final judgment for the County. The Second District reversed and noted that a ruling on a Motion to Dismiss must be confined to the four corners of the Complaint and, accepting the allegations of the Complaint as true, the court erred in looking outside the four corners and pressing counsel as to what evidence of notice the Plaintiff would be able to produce in ruling on a Motion to Dismiss.

Motion to Dismiss for Lack of Prosecution

Zuppardo v. Dunlap, 186 So. 3d 1067 (Fla. 2d DCA 2016)

Following a prolonged period of inactivity, the trial court sent a notice pursuant to Florida Rule of Civil Procedure 1.420 indicating that there had been no record activity. In response thereto, the Plaintiff filed a Notice of Filing which set forth a new address for his counsel filed in a related case in an attempt to explain the delay in this case. In serving the notice, Plaintiff's counsel misspelled opposing counsel's email address. The trial court's electronic filing system generated an alert that prompted Plaintiff's counsel to serve the notice in an alternate manner. The Plaintiff's counsel then emailed and mailed the notice to defense counsel. The Plaintiff also filed a Motion to Amend the Complaint 60 days after the inactivity order but the motion did not have a proposed Amended Complaint attached to it as required by Florida Rule of Civil Procedure 1.190(a).

The Defendants then moved to dismiss on the basis that the Plaintiff's filings were insufficient record activity due to technical deficiencies in each filing. The trial court dismissed and provided no elaboration as to why the two filings were insufficient to preclude dismissal as a matter of law. The Second District reversed. Although they agreed that the Plaintiff's filings were defective, they ruled that the trial court could not properly examine the substance of the pleadings to determine whether record activity had occurred. Rather, the rule mandated only a cursory review of the record to determine whether there have been any filings of record during the applicable time frame. Having found that there were filings during the 60-day time period, the dismissal was reversed.

New Trial

Finkel v. Batista, 202 So. 3d 913 (Fla. 3d DCA 2016)

Following a verdict in which the jury awarded the Plaintiff no damages from a motor vehicle accident, the trial court granted a Motion for New Trial based upon the general rule that a Plaintiff is entitled to recover at least the medical expenses incurred for any diagnostic testing reasonably necessary to determine whether an accident caused an injury. At trial, the Plaintiff's treating orthopedic surgeon determined that she sustained a partial, permanent injury to her lower back. On cross-examination; however, he admitted that the Plaintiff failed to disclose her prior accident history including another car accident and a slip and fall accident in which she sought treatment at a hospital to treat back pain. The treating orthopedic surgeon admitted that had he been aware of these other incidents, he may have changed his opinion regarding whether the accident caused her back pain.

The defense expert testified that certain of the treatment rendered to her after the accident was reasonable "giving Ms. Batista the benefit of the doubt that she was having complaints of pain after the accident, which I assume to be true." At the conclusion of the trial on damages, the trial court presented the jury with a verdict form which stated "Evan Finkel was negligent. Was such negligence the legal cause of loss, injury or damage to the Plaintiff, Yarielsi Batista?" The jury answered "no" to this question and, as a result, awarded no damages.

The Third District reversed the granting of the new trial noting that although there is a general rule that the Plaintiff is entitled to recover at least the medical expenses incurred for any diagnostic testing reasonably necessary to determine whether an accident caused injury, there are exceptions to this rule such as when the Plaintiff lacks candor with her treating physicians and fails to inform them of other accidents. Further, the Plaintiff did not object to the verdict form used which invited the jury to return a verdict on an all-or-nothing basis. The Third District pointed out that the jury could not be faulted for doing exactly what they were asked to do.

Post-trial interest

Shoemaker v. Sliger, 187 So. 3d 8631 (Fla. 5th DCA 2016)

As a result of a prior appeal, the amount of judgment was modified. The District Court ruled that post-trial interest accrues from the date of the original judgment as opposed to the date of the verdict.

Prejudgment Interest

H.D.E., Inc. v. Bee-Line Supply Company, Inc., 200 So. 3d 1300 (Fla. 5th DCA 2016)

Prejudgment interest on the amount of attorney's fees should have been assessed from the date of the order confirming the arbitration award which determined the prevailing party's entitlement to fees and not the date of the original arbitration award. Further, the amount of prejudgment interest should have been calculated on the amount of the award and included in the judgment to bear post-judgment interest on the full amount.

Proposal for Settlement

MYD Marine Distributor, Inc. v. International Paint, Ltd., 41 FLWD 911 (Fla. 4th DCA 4/13/16)

Even though the Plaintiff sought both damages and equitable relief in the form of a permanent injunction, the trial court found that they were entitled to attorneys fees pursuant to an offer of judgment where the offer was specifically limited to the money damages portion of the case and stated that, if the offer were accepted, the claims for money damages would be resolved but the claims for injunctive relief would remain pending.

Saterbo v. Markuson, 41 FLWD 2169 (Fla. 2d DCA 9/21/16)

The Second District ruled that the trial court erred in finding that a Joint Proposal for Settlement made by the Plaintiff to the driver of the vehicle and the owner of the vehicle was unenforceable where the Plaintiff sought attorney's fees only against the driver of the vehicle. In this case, the Second District ruled that a joint proposal served on the owner of the vehicle whose liability was solely vicarious was not required to be apportioned. They also ruled that with regard to the driver of the vehicle against whom the attorney's fees were sought, the Proposal for Settlement was not ambiguous because of the statutory cap on the owner's liability.

Colvin v. Clements and Ashmore, P.A., 182 So. 3d 924 (Fla. 1st DCA 2016)

The Plaintiff served a Proposal for Settlement that offered to "resolve all claims the Plaintiff has against the Defendants including, but not limited to, any claims for punitive damages." The proposal also stated that it was inclusive of

costs and attorney's fees. The Defendant rejected the proposal and the case proceeded to trial and the jury returned a verdict that was at least 25% greater than the settlement proposal. As a result, the Plaintiff moved to recover her attorney's fees.

The Defendant objected stating that the proposal failed to adhere to the requirements of Rule of Civil Procedure 1.442. Specifically, it failed to state whether attorney's fees were part of the legal claim and failed to state whether unitive damages were part of the claim. The trial court denied the request for attorney's fees noting that the law required strict compliance with the rules but "recognized the absurdity of requiring the proposal to state whether attorney's fees and punitive damages were part of the legal claim where the Plaintiff had not sought fees or damages in the complaint, nor could she have." The First District affirmed based upon other decisions from the Court but recognized a conflict with the Fourth District's application of the law.

Vanguard Car Rental USA, LLC v. Suttles, 190 So. 3d 672 (Fla. 3d DCA 2016)

The Defendant filed a Proposal for Settlement and, thereafter, was granted final Summary Judgment in its favor. The trial court denied the Defendant's award of attorney's fees because the Proposal for Settlement was made by the Defendant as a corporation when in fact the Defendant had been converted to a limited liability company and the Amended Complaint named the limited liability company as the party Defendant. The Third District reversed noting that the conversion of a Defendant from a corporation to a limited liability company had no affect on the Defendant's potential liability and, therefore, found the Proposal for Settlement was valid and enforceable.

Maines v. Fox, 190 So. 3d 1135 (Fla. 1st DCA 2016)

The First District held that the trial court abused its discretion in refusing to allow an expert who was both a medical doctor and a biomedical engineer from offering an opinion as to the specific causation of Plaintiff's injury based upon biomechanical force analysis. They found, however, that the limitation of testimony was harmless error because the expert was allowed - - through other testimony - - to convey a substantial portion of his opinion to the jury. Ultimately, the only testimony excluded was that the forces from this particular accident could not have caused the injury to this specific Plaintiff.

In doing so, the court stated that biomechanical opinions as to the general causation of a type of injury are admissible however, they are not allowed to render

opinions that require medical expertise. That being said, the courts allow medical experts to give opinions as to specific causation adding that "it is also not unusual for doctors to rely on anecdotal evidence of the history and severity of an accident in rendering a causation opinion."

Lastly, the First District held that it was error to award attorney's fees pursuant to a Proposal for Settlement where the Proposal for Settlement was ambiguous with regards to whether the proposal included attorney's fees and costs.

Manual Diaz Farms, Inc. v. Delgado, 193 So. 3d 71 (Fla. 3d DCA 2016)

Defendant filed a Proposal for Settlement and, following a favorable verdict, the trial court denied the Defendant's request for attorney's fees because the Defendants amended their Affirmative Defenses during the pendency of the proposal. The Third District also ruled that the proposal was not ambiguous by virtue of fact that it did not specify whether the claims would be resolved by a full or partial release, dismissal or any other means.

Florida Peninsula Insurance Company v. Brunner, 193 So. 3d 1026 (Fla. 3d DCA 2016)

The insurance company sent a Proposal for Settlement to the Plaintiff which included the following requirements:

1. This Offer of Judgment/Proposal for Settlement is to hold harmless Florida Peninsula Insurance Company, from any and all existing, or potentially existing, liens or other claims which any person or entities may have had on the damages sought in the lawsuit arising out of the Plaintiff, Ann Brunner's claims or potential claims in this case; and,
2. It is agreed upon by Ann Brunner and her respective counsel that all known liens, attorney charging liens or other claims of third parties will be satisfied and extinguished by Ann Brunner and her counsel.

The trial court denied the Request for Attorney's Fees and the Third District affirmed because the Proposal not only required Ms. Brunner but her counsel to agree not only to assure that counsel's own legal claims to the settlement funds are extinguished, but also to assure that counsel will satisfy and extinguish "other claims of third parties" without there being a signature block or other provision to indicate her attorney's agreement to assume such an open-ended liability.

Nunez v. Allen, 194 So. 3d 554 (Fla. 5th DCA 2016)

The Plaintiff filed identical Proposals for Settlement to the owner of a vehicle involved in a motor vehicle accident and the driver of the vehicle. Each proposal made clear that payment by the Defendant named in the Proposal would settle Plaintiffs' claims against that specific Defendant, but another paragraph stated that the proposal was inclusive of "all damages" claimed by the Plaintiff. As such, the Fifth District found that the proposals were ambiguous because it was unclear as to whether acceptance and payment of the proposal by one of the Defendants would resolve the case against both Defendants or only against the individual Defendant accepting the proposal.

Ochoa v. Koppel, 197 So. 3d 77 (Fla. 2d DCA 2016)

The Plaintiff filed a Proposal for Settlement. On the day before the 30-day period was set to expire, the Defendant filed a Motion to Enlarge Time pursuant to Florida Rule of Civil Procedure 1.090. In the motion, the Defendant argued that she did not have sufficient time to evaluate the Proposal because she had recently received a new MRI report bearing on the Plaintiff's injuries and because the case was in its infancy and the Plaintiff's deposition had not yet been taken. Thereafter, the Defendant set the motion for hearing. The court heard the matter but did not issue its ruling asking all parties to submit additional authorities within three days of the hearing. The day after the hearing, the Defendant served a notice accepting the Proposal for Settlement.

Two days later, she provided the Court with the authorities it had requested and later that day, the Court entered an Order denying the Defendant's request to enlarge time. The Plaintiff then filed a Motion to Strike the Notice accepting the Proposal for Settlement arguing that it was untimely. The Defendant opposed the motion arguing that the period remained tolled until the trial court denied her Motion for Enlargement of Time. The trial court agreed that the filing of the Motion to Enlarge Time tolled the time she had to accept the settlement proposal, denied the Motion to Strike and granted the Motion to Enforce Settlement.

The Second District reversed ruling that the filing of a Motion to Enlarge Time to respond to a Proposal for Settlement does not automatically toll the time pending a decision on the motion.

Kuhajda v. Borden Dairy Company of Alabama, LLC, 202 So. 3d 391 (Fla. 2016)

The Supreme Court reversed a decision of the First District Court of Appeal and held that an offer of settlement is not invalid for failing to state whether the proposal includes attorneys' fees under Florida Rule of Civil Procedure 1.442(c)(2)(F) if attorney's fees are not sought in the pleadings.

Anderson v. Hilton Hotels Corp, 202 So. 3d 846 (Fla. 2016)

The Plaintiff was a victim of an armed robbery, car jacking and shooting that occurred in the parking lot of an Embassy Suites Hotel. The Plaintiff filed an action against Hilton Hotels, W2007 Equity Inns, Interstate Management and SecurAmerica. Hilton was the parent company of the Embassy Suites franchise; W2007 was an investment fund which owned the Embassy Suites Hotel; and Interstate was the management company that oversaw the daily operations of the hotel. SecurAmerica provided security services for the hotel. The Plaintiff's wife also sought damages for loss of consortium.

The Plaintiff filed separate offers of settlement to Hilton, W2007 and Interstate and also made a separate offer to SecurAmerica. As part of the proposal for settlement, the Plaintiff stated that "this proposal for settlement is made for the purposes of settling any and all claims made in this cause by Plaintiff against [the Defendant]." Separate proposals for settlement were filed by the Plaintiff's wife. Prior to trial; however, Plaintiff's wife voluntarily dismissed her cause of action without prejudice.

At trial, Hilton, W2007 and Interstate were represented by a single law firm and SecurAmerica was represented by a separate firm. Throughout trial, Hilton, W2007 and Interstate were collectively referred to as "Embassy Suites." Jury instructions were given in which the jury was advised "for purposes of your deliberation…Interstate…Hilton Hotels…and W2007…are considered one and the same." The jury found in favor of the Plaintiff and found that Embassy Suites was 72% negligent and SecurAmerica was 28% negligent. Based on a total award of $1,702,066, judgment was entered against Hilton, W2007 and Interstate in the amount of $1,225,487.52 and against SecurAmerica in the amount of $476,578.48.

The trial court denied Plaintiff's Motion for Attorney's Fees pursuant to the proposals for settlement and the Fifth District affirmed. The Supreme Court reversed and found that the proposal for settlement was not ambiguous and held that there was no merit to the claim that the Plaintiff's offer was ambiguous because it did not address the claims of the Plaintiff's wife, because the Plaintiff's proposals were not joint proposals, made no reference to his wife's claims and

were sufficient to allow each Defendant to make an informed decision about settling. They also held that the Plaintiff was entitled to recover fees based upon the fact that the final judgment exceeded each of the individual proposed settlement amounts by more than the statutorily required 25%.

Punitive Damages

State Farm Mutual Automobile Insurance Company v. Brewer, 191 So. 3d 508 (Fla. 2d DCA 2016)

Following a verdict in favor of a Plaintiff in a motor vehicle accident case, the jury determined that punitive damages were appropriate and awarded the Plaintiff $284,000 despite the fact that the Defendant's uncontroverted testimony was that his net worth was $284,000. The Second District reversed finding that a punitive damage award equal to 100% of the Defendant's net worth was so excessive as to be unconstitutional.

On remand, they ruled that the trial court may remit the punitive damages award to a reasonable proportion of the Defendant's net worth or order a new trial on punitive damages if the Plaintiff's did not wish to accept a remittitur. In so doing, they pointed out that the Fourth District had previously decided that a punitive damage award representing 40% of the Defendant's net worth was excessive.

Rosen v. McCobb, 192 So. 3d 576 (Fla. 4th DCA 2016)

Following an altercation, the Plaintiff filed a personal injury action alleging claims for assault and intentional/negligent infliction of severe emotional distress. The Defendant counterclaimed for unjust enrichment and civil battery and the trial court subsequently granted a Motion for Leave to Add a Punitive Damages Claim. Part of the list of items requested from the Defendant would have caused her to disclose financial information related to her non-party husband. The Fourth District held that it was improper to order production of financial information of a non-party.

TRG Desert Inn Venture, Ltd. v. Berezovsky, 194 So. 3d 516 (Fla. 3d DCA 2016)

The trial court granted Plaintiff's Motion for Leave to Add a Claim for Punitive Damages. The Third District denied certiorari. In doing so, they stated that certiorari is the appropriate remedy to challenge a trial court's order allowing

punitive damages when the essential requirements of law, as embodied in Florida Statute §768.72, have not been followed. Thus, certiorari can be granted when the record establishes that a trial court applied the incorrect law. In this case, at most, the trial court incorrectly applied the correct law and this is not reviewable by certiorari.

Tenet Hialeah Healthsystem, Inc. v. Gonzalez, 196 So. 3d 511 (Fla. 3d DCA 2016)

The hospital sought certiorari review of the trial court's order allowing the Plaintiff to amend their Complaint to allege punitive damages in an action for mishandling of a minor's corpse. The Third District stated that it could not review an order authorizing a claim for punitive damages beyond determining whether the trial court followed the procedural requirements and having found that the trial court did so, they denied the Petition for Certiorari.

HCA Health Services of Florida, Inc. v. Byers-McPheeters, 201 So. 3d 669 (Fla. 4th DCA 2016)

The Fourth District granted certiorari and held that the trial court departed from the essential requirements of law by allowing the Plaintiffs to plead a claim for punitive damages without first determining whether the Plaintiffs' proffer established a reasonable basis for recovery pursuant to Florida Statute §768.72(3).

Recusal

Lawnwood Medical Center, Inc. v. Seeger, 204 So. 3d 467 (Fla. 4th DCA 2016)

A Writ of Prohibition was denied after the trial court refused to recuse itself. The Fourth District denied the writ even though the trial Judge previously granted a temporary injunction against the hospital and compared the hospital's procedures on confidentiality for peer review and credentialing records to those of "the Taliban." Judge Gross dissented because he believed the hospital would reasonably fear not receiving a fair and impartial trial adding that "the fear is not rendered unreasonable because the current lawsuit involves an alleged breach of the bylaws and the former case concerned the confidentiality of peer review and credentialing."

Sanctions

Prater v. Comprehensive Health Center, LLC, 185 So. 3d 559 (Fla. 3d DCA 2016)

On the evening of the first day of jury selection, Plaintiff's counsel discovered an electronic copy of a page from a prescription pad from Comprehensive's office with the handwritten words "Prilosec OTC" scrolled across it. There was no patient name, date, or doctor's signature on the document. One of the doctors involved in the case had testified that the words on the document appeared to be in her handwriting. Her medical records detailing the Plaintiff's visit that day contained no indication that the doctor prescribed or recommended this medication. The question of whether the doctor had prescribed or recommended Prilosec to the Plaintiff emerged as an issue at some point during pretrial discovery. It was undisputed that the Plaintiff complained of stomach pain during her initial visit. Although the notes from the first visit do not reflect that the doctor prescribed or recommended Prilosec, notes of the follow up visit indicates that the patient was seen previously for lower abdominal pain and states that she was prescribed Prilosec which did not help.

In any event, when the Plaintiff's counsel discovered the electronic copy of the document in his computerized records, he immediately notified defense counsel and the issue was addressed in court the following morning prior to the resumption of jury selection. The trial court initially indicated that if the Plaintiff had not previously produced the document, this was a violation of the pretrial order and it would be excluded from trial. Plaintiff's counsel explained the circumstances surrounding the late discovery of the document. Specifically, when Plaintiff's counsel met with his client at the inception of the case, she showed him the document and it was scanned into the law firm's computer and the original was returned to the Plaintiff. The scanned copy of this note was not stored with the other electronic records in the case and was not discovered by Plaintiff's counsel until after a jury selection had begun.

Following the explanation, the court gave the Plaintiff two options: she could proceed to trial without using or referring to the document or she could agree to a mistrial and potentially bear the attorney's fees and costs associated with a mistrial. Plaintiff accepted the latter alternative, the jury panel was stricken, and the court reserved ruling, pending further discovery, on whether fees and costs would be awarded. What followed, however, was a sanctions hearing followed by a court ordered deposition to discern the chain of custody of the late discovered document and the efforts to locate the original before another sanctions hearing. At

the second sanctions hearing, the court in a contentious exchange with Plaintiff's counsel, eventually ordered the Plaintiff's pleadings be stricken.

The Third District reversed finding that there was insufficient evidence to support the trial court's conclusions that each of the *Kozel* factors had been met including the absence of records support for a finding that the actions of Plaintiff's counsel were willful, deliberate or contumacious and the finding that Plaintiff's counsel had been previously sanctioned.

Tedrow v. Cannon, 186 So. 3d 43 (Fla. 2d DCA 2016)

The Plaintiff claimed injuries following a dog bite. In this case, the owner had displayed the statutorily required "bad dog" sign thereby relieving him from strict liability. The Defendant served the Plaintiff with a Motion for Attorney's Fees under Florida Statute 57.105. 21 days passed, but then ultimately Plaintiff filed a Notice of Dismissal. The Second District ruled that the Defendant was entitled to fees because the 21-days had passed before the time the Plaintiff voluntarily dismissed the case. The court prohibited the Defendant, however, from using any privileged information between the Plaintiff and her counsel to prove entitlement to fees.

Griffith v. Ramzey's A Plus, Inc., 186 So. 3d 629 (Fla. 5th DCA 2016)

Griffith and her attorney appealed a trial court's order assessing attorney's fees against them for refusing to answer a question at her deposition, asserting that the question was irrelevant and an improper hypothetical. On appeal, they claim that the trial court improperly sanctioned them without making the findings required by *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993). The Fifth District disagreed commenting that *Kozel* applies when the trial court dismisses a claim or case or enters a default or strikes pleadings as a sanction. It does not apply when expenses are assessed under Florida Rule of Civil Procedure 1.380(a)(4).

Public Health Trust of Miami-Dade County v. Denson, 189 So. 3d 1013 (Fla. 3d DCA 2016)

In this medical malpractice case, the Defendant doctor had conversations with witnesses within ear shot of jurors on two separate occasions. Ultimately, the trial court granted a Motion for Mistrial. The Plaintiff then moved for sanctions seeking $49,000 in attorney's fees representing the time preparing for the first trial. The trial court denied the motion without prejudice. A second trial resulted in a

mistrial due to a shortage of potential jurors. A year later, the third trial went forward to conclusion. The Plaintiff then renewed her Motion for Sanctions and sought $238,000 in preparation for all three trials.

The trial court awarded $208,000 in fees finding that the Plaintiff was not entitled to recover fees for the second trial, but she was allowed to recover fees for the first and third trials. The trial court specifically found that the Defendant physician had engaged in a pattern of behavior that reflected a total disregard for and disrespect to the court and that such misconduct was supported by the record.

The Third District upheld the decision to award sanctions, however, it found that the trial court abused its discretion in awarding attorney's fees beyond that necessary to compensate the Plaintiff for the preparation and conduct of the first trial. The Third District found that the time spent for the second and third trials did not directly relate to the Defendant's misconduct and therefore remanded to the trial court for entry of an award consistent with the time spent in preparation for and attendance at the first trial.

Watson v. Stewart Tilghman Fox & Bianchi, 195 So. 3d 1163 (Fla. 4th DCA 2016)

The Defendants filed a Motion for Attorney's Fees pursuant to Florida Statute §57.105, however, they did not comply with the safe harbor notice provisions of §57.105(4). The Court directed the Plaintiff to pay attorney's fees pursuant to Florida Statute §57.105(1). The Fourth District held that the trial court did not abuse its discretion in ordering the Plaintiff to pay attorney's fees pursuant to the statute, on the Court's own initiative, when a motion is filed by a party and the moving party fails to comply with the safe harbor requirements, as long as it can be determined that the court was not simply adopting the moving party's defective motion.

Olawoye v. Arubuola, 198 So. 3d 1086 (Fla. 1st DCA 2016)

The First District reversed the trial court finding that it erred in striking the Defendants' pleadings and entering a default judgment against him as a sanction for failing to comply with the Case Management Order without finding that the Defendants' conduct was willful and contumacious. The District Court also found that the trial court erred in awarding damages to the Plaintiff based upon the Plaintiff's Affidavit where the Plaintiff had requested a jury trial.

Robinson v. Ward, 203 So. 3d 984 (Fla. 2d DCA 2016)

The Second District upheld an order granting a new trial on the basis that defense counsel's misconduct during the trial, damaged the fairness of the trial, despite multiple instances in which the Plaintiff's attorney did not object. As the court noted "it is also important to keep in mind that where one party's counsel repeatedly refuses to comply with the court's ruling, the other party's counsel is put in a difficult situation. On the one hand, an objection is necessary to preserve the error. But on the other hand, making numerous objections may alienate the jury." Additionally, the Second District found that the trial court did not abuse its discretion by imposing sanctions against the attorney whose misconduct, including presenting evidence which had been excluded by the court and cross-examining Plaintiff about matters which the court had instructed him not to raise, damaged the fairness of the trial, thus requiring a new trial. Although the order imposing sanctions did not include the specific words "bad faith" it did state that the attorney's actions were "improper and deliberate" and resulted in a miscarriage of justice.

Summary Judgment

McNabb v. Taylor Elevator Company, 203 So. 3d 184 (Fla. 2d DCA 2016)

The Plaintiff slipped and fell near an elevator in a condominium. At some time prior to the fall, a Victaulic seal in the elevator machinery broke and leaked oil into the machinery room and out into the hallway. A technician who had serviced the leak after the fall testified that the seal was leaking at a rate of a drip every two seconds. He testified that the oil on the floor was a quarter inch deep. The elevator company submitted evidence showing that, three days prior to the fall, it had inspected the elevator machinery including the seal and its inspectors testified that it was not leaking. Based upon this, the elevator company moved for summary judgment.

In opposition to the Motion for Summary Judgment, the Plaintiff submitted the Affidavit of a mechanical engineering expert who opined that the seal had been leaking for 4.5-18 days. His opinion was based on the flow rate of the oil leaking from the seal as observed by the technician, drip test and the depth of the spill, as well as the dimensions of the machinery room. The trial court granted the Defendant's Motion for Summary Judgment finding that the Plaintiff's expert's Affidavit was not based upon actual facts. The Second District reversed and found that the trial court's ruling was in error having improperly weighed the evidence when it discounted the expert's Affidavit.

Natiello v. Winn-Dixie Stores, Inc., 203 So. 3d 209 (Fla. 4th DCA 2016)

Plaintiff's counsel arrived for a summary judgment hearing at the scheduled time but left to go to the restroom when he saw the defense counsel was not present. When Plaintiff's counsel returned to the court room a few minutes later, the trial court and defense counsel were wrapping up the summary judgment hearing. Despite defense counsel's willingness to re-argue the matter, the trial court refused to allow Plaintiff's counsel to argue. The trial court also later denied the Plaintiff's verified motion for rehearing and entered Final Judgment in favor of the Defendant. The Fourth District reversed because Plaintiff's counsel was only a few minutes late for the summary judgment hearing and offered a patently reasonable explanation for his tardy appearance and there was no showing of prejudice or willful misconduct. As such, the trial court abused its discretion in refusing to allow Plaintiff's counsel to present argument at the hearing.

Worker's Compensation Immunity

Gil v. Tenet Healthsystem North Shore, Inc., 204 So. 3d 125 (Fla. 1st DCA 2016)

The decedent worked as a carpenter for the hospital where he was exposed to hazardous materials and, allegedly, died of cancer as a result thereof. The decedent's wife attempted to get worker's compensation from the hospital; however, according to her Affidavit, employees at the hospital informed her that her "husband's illness was not a work related illness." She then filed a petition for worker's compensation benefits and the hospital denied the petition stating "entire claim denied as Claimant's employment is not the major contributing cause for his death."

Upon receiving the notice of denial, the Plaintiff voluntarily dismissed the worker's compensation petition because the denial "confused" her and "it was clear to her that this was just another denial of any worker's compensation benefits because it was not a work related illness." She then filed a wrongful death suit against the hospital in Circuit Court. The hospital moved for summary judgment and claimed that it was immune from civil suit because the exclusive remedy was worker's compensation. The Plaintiff responded that summary judgment should not be granted because there was a question of fact as to whether the hospital was estopped from claiming worker's compensation immunity.

The lower court granted summary judgment in the hospital's favor and the Fourth District reversed. In doing so, it stated that if an employer takes the position in a worker's compensation proceeding that the employee is not owed worker's compensation because "the injury did not occur during the course and scope of the employment or that there was no employment relationship," the employer may be subsequently estopped from claiming immunity on the grounds that the "worker's exclusive remedy was worker's compensation…however, if an employer merely states a defense within the worker's compensation proceeding, an employer will not be estopped from later asserting immunity." The hospital contends that it had not taken inconsistent positions but rather, asserted the "medical causation defense" under Florida Statute 440.09(1). The Fourth District stated that, if the hospital merely intended to allege the medical causation defense, it did not so clearly and that the language employed in the notice of denial could give rise to more than one interpretation. As such, summary judgment was inappropriate.

Work Product Privilege

Marshalls of M.A., Inc. v. Witter, 186 So. 3d 570 (Fla. 3d DCA 2016)

When a party asserts the work-product privilege, Florida law requires that the trial court hold an *in-camera* inspection of the discovery material at issue in order to rule on the applicability of the privilege. The failure to conduct an *in-camera* inspection of the discovery materials a party asserts are protected by the work-product privilege constitutes a departure from the essential requirements of law subject to certiorari relief.