Procedural and Legal Issues

Affidavits

Team Health Holdings, Inc. v. Caceres, 320 So. 3d 232 (Fla. 3d DCA 2021)

Team Health is a Delaware corporation with its principal place of business in Tennessee. It moved to dismiss the Plaintiffs' medical malpractice complaint for lack of personal jurisdiction and attached an Affidavit of the corporation's Chief Operations Counsel in support of its motion. While the Affidavit itself was legally sufficient, the Plaintiffs contested its sufficiency because the affiant failed to attach any documents to it. The Third District ruled that there is no requirement that such documents be attached and that where a Defendant submits sworn proof contesting jurisdictional allegations, the allegations in the Affidavit are to be taken as true and the burden then shifts to the Plaintiffs to prove by sworn proof the basis upon which jurisdiction may be obtained. In the event that the Affidavits are in conflict, then the trial court should hold an evidentiary hearing.

Amendment of pleadings

Shajine v. Granada Insurance Company, 319 So. 3d 762 (Fla. 3d DCA 2021)

At Plaintiff's Motion for Final Summary Judgment, the Defendant made an *ore tenus* Motion to Amend its answer to assert an additional affirmative defense. The trial court denied this. The Third District reversed finding that the Defendant had not abused its privilege to amend, the amendment would not be futile and the Plaintiff would not be prejudiced by the amendment. As such, summary judgment was reversed.

State Farm Mutual Automobile Insurance Company v. Global Neuro and Spine Institute, 323 So. 3d 754 (Fla. 4th DCA 2021)

In 2015, Global Neuro filed a Complaint against State Farm for breach of contract. The Complaint alleged that Global treated an individual insured under a State Farm policy but that State Farm failed to timely make payments as required under the policy. Three years later, the county court issued an order setting pre-trial deadlines. The parties filed a Joint Pre-Trial Stipulation pursuant to this Order. The Joint Pre-Trial Stipulation listed the disputed issues of law in fact including "whether CPT Codes 77003A4550 were unbundled? (Plaintiff objects to this issue inclusion

as an unpled defense, however, Defendant will be filing a copy of its Motion for Leave to Amend Answer and Affirmative Defenses to plead unbundling as a defense)."

That same day, State Farm moved to amend its answer and Affirmative Defenses and the trial court denied the motion because the case had been pending since 2015 and because the pre-trial deadlines had passed. In reversing the trial court, the Fourth District stated that the trial court's reasons for denying the Motion for Leave to Amend including the pre-trial order and how long the case was pending can be relevant to a court's determination of prejudice or abuse of the amendment process, but without more, those reasons are insufficient to find prejudice or abuse of the process. The Fourth District concluded that State Farm had not abused the process of amending, the Plaintiff did not argue that the amendment would have been futile and there was no prejudice. As a result, the Fourth District reversed.

State Farm Mutual Automobile Insurance Company v. Baum Chiropractic Clinic, P.A., 323 So. 3d 756 (Fla. 4th DCA 2021)

Four years after State Farm answered the Plaintiff's complaint in a breach of contract action in which they did not assert any Affirmative Defenses, the trial court entered an order setting the case for trial and required the parties to file a pre-trial stipulation. The parties agreed that the lawsuit involved a determination of whether the treatment rendered was related to the accident, was medically necessary and was reasonable in price. Six days before trial, State Farm moved to amend to add several Affirmative Defenses including a set-off for PIP payments made pre-suit for services found not to be reasonable, related or medically necessary. The trial court denied the request to amend, and the Fourth District affirmed. In doing so, it stated that while Florida encourages a policy of liberality in allowing litigants to amend their pleadings, the policy narrows as the case approaches trial. Here, the case had been pending for four years yet State Farm did not decide to amend its pleadings until six days before trial.

Apex Doctrine

In Re: Amendments to Florida Rule of Civil Procedure 1.280, 324 So. 3d 459 (Fla. 2021)

The Florida Supreme Court adopted Florida Rule of Civil Procedure 1.280(h) which extends the apex doctrine to protect high level corporate officers from the risk of abuse of discovery and extending the protection which previously only protected

high-level government officials. Under the rule, a current or former high-level government or corporate officer may seek an order preventing them from being subject to a deposition. The motion must be accompanied by an affidavit or declaration of the officer explaining that the officer lacks unique, personal knowledge of the issues being litigated. If the officer provides such an affidavit or declaration, the trial court then will issue an order preventing the deposition unless the party seeking the deposition demonstrates that it has exhausted other discovery, that such other discovery is inadequate and that the officer in fact has unique, personal knowledge of discoverable information.

Attorney/Client privilege

American Home Assurance Company, Inc. v. Sebo, 324 So. 3d 977 (Fla. 2d DCA 2021)

Sebo purchased a home in April 2005. American Home provided homeowner's insurance to him. In December 2005, he filed a claim for water intrusion and other damage to the home and American Home denied coverage for most of the claimed losses. Sebo then filed a lawsuit against a number of Defendants and in November 2009 amended his Complaint to add American Home as a Defendant seeking a declaration that the policy provided coverage for his damages. After settling his claims against the majority of the other Defendants, Sebo proceeded to trial in his declaratory action against American Home. The jurors found in favor of Sebo and the trial court entered judgment against American Home. Appeals followed and ultimately the Florida Supreme Court affirmed the jury verdict finding that the "concurrent cause" doctrine applied.

Sebo then initiated his first-party bad faith action and served a Request for Production seeking various documents related to the denial of the claim. At issue were documents created before the final judgment was entered and American Home objected based upon work product and attorney/client privilege. The Second District noted that the Supreme Court's decision in *Allstate Indemnity Company v. Ruiz*, 899 So. 2d 1121 (Fla. 2005) found that the work product doctrine does not apply to documents prepared in connection with the evaluation of the underlying insurance claim and such documents are not shielded from discovery because the claim's materials are needed to determine whether the insurance company acted in bad faith. *Ruiz* did not, however, address attorney/client privilege.

As the district court noted, attorney/client privilege differs because it is a statutorily protected privilege of confidentiality and is not concerned with the litigation needs of the opposing party. There are potential exceptions to the

attorney/client privilege in bad faith cases when an insurer raises the advice of its counsel as a defense in an action and when the insurance company has hired an attorney to both investigate an underlying claim and give legal advice. Because of these exceptions, the Second District granted certiorari and held that the trial court must conduct an *in camera* inspection to determine if the materials at issue were truly protected by attorney/client privilege.

Brinkmann v. Petro Welt Trading, 327 So. 3d 918 (Fla. 2d DCA 2021)

The Defendants turned over some documents in discovery but filed a privilege log with regard to others. The non-parties, all of whom were represented by the same attorney, who was representing the Defendants, also turned over documents and voluntarily filed privilege logs as to other requests. The Plaintiffs argued that all of the privilege logs were insufficient because they failed to accurately describe the documents withheld. A Motion to Compel was referred to a General Magistrate who overruled the privilege objections. With regard to the non-parties, the Magistrate ordered them to produce all withheld and redacted documents referencing the privilege log, because they failed to establish a basis for the privilege in the logs. The Defendants filed exceptions to the report and recommendation, but the non-parties did not. At the hearing, counsel argued that the exceptions applied to both the non-parties and the parties because counsel represented the non-parties as well. The trial court affirmed the Magistrate's recommendations which found that many of the asserted privileges were unrecognized by Florida law and were items the non-parties simply wanted to keep confidential. As a result, the non-parties filed a Petition for Writ of Certiorari. The District Court noted that the accountant/client and attorney/client privileges have long been recognized and it was unclear as to whether the Magistrate had considered that the privileges had been properly raised, therefore, the trial court departed from the essential requirements of law by overruling those privileges without any findings or analysis.

Andreatta v. Brown, 330 So. 3d 589 (Fla. 1st DCA 2021)

In granting certiorari involving an alleged claim of privilege, the First District noted that Rule of Civil Procedure 1.280(b)(6) does not use the word "log" or require any specific form for a "privilege log." Instead, a party must only make the privilege claim expressly and describe the nature of the documents, communication or things not produced or disclosed in a manner that will enable the other parties to assess the applicability of the privilege or the protection. If a party fails to supply adequate information, then the trial court may find a waiver of attorney/client privilege adding

that while waiver is within the court's discretion, a waiver finding is not favored. Here, the Petitioner's counsel repeatedly e-mailed Respondent's counsel that he redacted attorney/client communications explaining that his clients had forwarded emails to him that were responsive to the discovery requests and apparently included discussion about those emails when they forwarded them. The Respondents moved to compel and requested a privilege log for any documents redacted on privilege grounds. After a hearing but without an *in camera* inspection of the emails, the trial court found that the lack of a privilege log constituted a waiver of the attorney/client privilege. The First District found this was an abuse of discretion and a departure from the essential requirements of law and issued a writ of certiorari.

Attorney's fees

Universal Property & Casualty Insurance Company v. Celestrin, 316 So. 3d 752 (Fla. 3d DCA 2021)

The trial court acted in an arbitrary manner by failing to reduce an award for attorney's fees where the experts for both parties provided testimony that a reduction was necessary, and the trial court ignored that recommendation without explanation. It is hornbook law that counsel cannot be compensated for work towards determining the amount of fees it seeks to recover.

United Automobile Insurance Company v. Professional Medical Group, Inc., 318 So. 3d 1261 (Fla. 3d DCA 2021)

Where the insurance company requested that the trial court hold an evidentiary hearing on the issue of attorney's fees, it was error for the trial court to award attorney's fees without conducting the evidentiary hearing.

Lizardi v. Federated National Insurance Company, 322 So. 3d 184 (Fla. 2d DCA 2021)

Even though there was no transcript of an evidentiary hearing which resulted in an award of attorney's fees, the Second District reversed because the trial court's order was fundamentally erroneous on its face where the trial court reduced the Plaintiff's hourly rate and the amount of hours for which payment was requested without making specific findings to support its determination and also failed to award pre-judgment interest.

El Brazo Fuerto Bakery v. 24 Hour Air Service, Inc., 330 So. 3d 552 (Fla. 4th DCA 2021)

The Plaintiff prevailed on a breach of contract action and then moved for an award of attorney's fees. The Plaintiff's attorney testified that the Plaintiff had retained his firm to pursue his claim. The retainer was partially contingent whereby the Plaintiff agreed to pay the firm a flat $2,000 attorney's fee and also agreed that the firm could seek the balance from the court along with a multiplier. The firm spent 121.2 hours on the litigation and substantiated the testimony with detailed time records. The Plaintiff's attorney testified how the work performed satisfied the factors in *Rowe* as modified by *Quanstrom*, and further testified that the firm would not have taken the case on a partial contingency fee basis without the possibility of a multiplier. The Plaintiff's attorney testified that both he and his partner had been practicing for about a year and a half and charged $350 per hour.

On cross-examination, the defense attorney questioned Plaintiff's counsel regarding his time entries but not the hourly rate. The Plaintiff's expert testified that he was a 25-year former Judge and charged $600 per hour opining that while 7.5 hours should be deducted from a review of the records and bills, the $350 was a reasonable hourly rate. He also opined that the relevant market required a contingency fee multiplier to obtain competent counsel for which he believed the 2.5 multiplier was warranted. The expert also testified he spent 11 hours preparing for the hearing. Defense counsel then acted as the defense expert by proffer and testified that the market rate for an attorney with less than 2 years of experience was $225 per hour and that the claim did not justify a multiplier.

The trial court revised the Plaintiff's proposed order, did not reduce any of the hours incurred, but reduced the Plaintiff's hourly rate to $175 or half of what the expert opined was reasonable. The court also found that the Plaintiff's expert was entitled to only 8.8 hours at a $225 hourly rate (less than the $6,600 that had been testified to).

The Fourth District found that the trial court abused its discretion and noted that the Defendant did not present any expert or other evidence to refute the Plaintiff's expert opinion and the Judge did not indicate that her that her determination of a reasonable hourly rate is rooted in her experience as a lawyer. Even with defense counsel's proffer, the hourly rate should have been $225 per hour or $50 more than the trial court awarded. The Fourth District also found that the trial court erred in making internally inconsistent findings supporting the application of the multiplier but then did not apply the multiplier.

Lastly, the court erred in not awarding prejudgment interest from the date on which the county court found that Plaintiff was entitled to attorney's fees. As such, the matter was reversed and remanded with instructions to either amend the award as requested or explain a legal basis for its reduced hourly rates; either award a multiplier or strike the *Quanstrom* findings justifying the multiplier and explain why the county court rejected the Plaintiff's expert's uncontroverted testimony; and (3) calculate and award the amount of prejudgment interest on the ultimate attorney's fees award measured from the date of the order granting the motion for entitlement to fees through the date of the amended judgment's rendition.

Citizen's Property Insurance Corp. v. Casanas, 46 FLWD 2324 (Fla. 3d DCA 10/27/21)

Casanas filed suit for underpayment of a hurricane damage claim. "The case was minimally litigated – - there were no depositions taken, no dispositive motions filed, few hearings and no trial." The case settled at mediation for $35,000 and the trial court subsequently concluded that that the lodestar was $70,800 and added a 1.8 multiplier for a fee of $127,440. The total fee award was for $150,600, including $9,360 in litigation costs and $13,800 for Plaintiff's fee expert. As the Third District pointed out the final award of costs and fees was nearly five times the amount of the settlement.

The Third District concluded that the hourly rates billed for each attorney were reasonable based on the evidence in the record. They found that the lodestar amount was unsupported by competent, substantial evidence that the number of hours billed were reasonable, nor did the trial court make any specific findings as to disputed time entries. Rather, without explanation, the trial court adopted the Plaintiff's fee expert's 10% blanket reduction in the number of hours expended which the Third District found was "arbitrary and unsupported." The Appellate Court reversed the lodestar amount with instructions to reduce the number of hours billed to 81.1 hours because this was the only number for which there was competent, substantial evidence adduced by the Defendant's fee expert following a line-by-line accounting of compensable hours.

It also reversed the trial court's application of a multiplier because there was no evidence that Plaintiffs could not have obtained other competent counsel in the market absent the availably of a contingency fee multiplier, nor did Plaintiff's counsel establish that there was a risk of non-payment because the parties' retainer agreement expressly provided for counsel's recovery of fees. Lastly, it reversed the

litigation costs assessed. The Plaintiff submitted two expert invoices but did not present any evidence regarding the reasonableness of the litigation costs or whether they intended to call the expert witness for trial. The Third District stated that the trial court erred because it "awarded costs without making any factual findings regarding which expenses would have been reasonably necessary for an actual trial."

Reyes v. Cosculluela, 46 FLWD 2327 (Fla. 3d DCA 10/27/21)

On the eve of trial, the Plaintiff voluntary dismissed his nuisance lawsuit against his neighbor. The trial court then ordered an award of attorney's fees as a sanction pursuant to Florida Statute §57.105(1). The Third District found that Reyes had asserted a viable claim, albeit a weak one, that the noise emanating from the batting cage on his neighbor's property interfered with the enjoyment of his home so as to constitute a nuisance. As such, they concluded that the award of attorney's fees was unwarranted.

Certiorari

The Hertz Corporation v. Sider, 311 So. 3d 1004 (Fla. 2d DCA 2021)

A claim of work-product protection or attorney-client privilege is not mature for appellate review when a privilege log has not yet been filed. As such, certiorari was denied.

Cavey v. Wells, 313 So. 3d 188 (Fla. 2d DCA 2021)

The Personal Representative filed a one count complaint against Sherriff Wells in his official capacity arising out of a suicide which occurred in the Manatee County Jail. Sheriff Wells moved for summary judgment and while discovery was ongoing, the Sheriff ran into the Personal Representative at his doctor's office where the Personal Representative is employed. It is alleged that the two spoke and that the Sheriff made several inculpatory statements including that a number of Sheriff's office employees were terminated or reassigned as a result of the suicide; the lawsuit was meritorious; and the Sheriff would also pursue litigation if his child had been involved in the same incident.

The Personal Representative then sought to depose the Sheriff who moved for protective order. In support of the Motion, the Sheriff filed a sworn affidavit in which he admitted to having a conversation with the Personal Representative but denied making the statements inculpating his office. The trial court granted the Sheriff's motion and, in making its ruling, the trial court found that the Sheriff would not have any relevant testimony related to policies and procedures that should have been in place at the jail; that the Sheriff would not be a relevant fact witness because he had no firsthand knowledge of what took place at the jail; and with regards to the alleged statements to the Personal Representative, the statements constituted inadmissible subsequent remedial measures which were not relevant to the issue of negligence, would confuse the jury and their probative value would be substantially outweighed by their prejudicial effect. The Court ultimately concluded that it was not going to authorize the deposition to inquire about an issue that was not coming in before the trier of fact. The Second District granted certiorari finding that there was material injury that could not be corrected on post-judgment appeal, because it would be impossible to determine whether or how this discovery prohibition affected the outcome of the case. The court further found that the trial court's order departed from the essential requirements of the law, citing Florida Rule of Civil Procedure §1.280(b)(1) which states that "it is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Tanner v. Hart, 313 So. 3d 805 (Fla. 2d DCA 2021)

Hart sued Tanner in 2018, alleging negligence in connection with a 2014 automobile accident that occurred when Tanner was 79-years old. In 2019, Hart sought to depose Ms. Tanner who was then in hospice care and suffering memory loss associated with dementia as confirmed by two of her physicians. After learning of her diagnosis and her inability to be deposed, Hart sought production of Tanner's medical records. The request for "any and all" records was objected to by Tanner claiming an invasion of her right to privacy, overbreadth and sought information that was irrelevant to the issues framed by the pleadings; that is whether Tanner was negligent in 2014.

The trial court initially sustained the objections finding that Tanner's medical condition was not at issue and concluding that the disclosure of the records would violate her right to privacy. The trial court later granted Plaintiff's request for reconsideration and directed production of the records from December 2011 through April 2020. The trial court did not examine the records *in camera*, but rather directed the parties to execute a confidentiality agreement.

The Second District granted certiorari ruling that the trial court departed from the essential requirements of law by compelling disclosure of nearly 10 years' worth of inclusive medical information without first determining its relevance and balancing the need for such information against Tanner's privacy interests. The court further pointed out that the confidentiality agreement did not affect this conclusion because "medical records may not be disclosed to opposing parties, or their counsel until after the trial court reviews the records *in camera* to determine their relevance.

Gulfcoast Spine Institute, LLC v. Walker, 313 So. 3d 854 (Fla. 2d DCA 2021)

It was alleged that Walker suffered injuries when Martinez's vehicle collided with her. After the accident, Walker sought treatment from BioSpine, amongst other providers. She signed an agreement under which the cost of her medical care was "her responsibility whether her insurance company pays or not." Here, her health insurer paid for some of her treatment but not for all of it.

Martinez eventually sought extensive discovery from parties and non-parties alike relevant to this case. He sought information from BioSpine including its methodology for determining its pricing; its methodology for using CPT codes; contracts it had reached with private insurers; its realization rates from different categories of patients; and its overhead cost for medical equipment, personnel, procedures and facilities.

Martinez also sought documentation for other patients who received the same procedures that Walker did. BioSpine moved for protective order arguing that many of the items sought were confidential and proprietary business information and that the Defendant was seeking trade secrets without satisfying the requirements under Florida law of establishing reasonable necessity.

The trial court eventually granted Martinez's discovery and the Second District quashed this order and granted certiorari finding that the trial court departed from the essential requirements of the law by compelling a non-party medical provider to disclose undisputed trade secrets without conducting the relevant balancing test whereby making findings or implementing protective measures as required by law.

Avatar Property & Casualty Insurance Company v. Mitchell, 314 So. 3d 640 (Fla. 3d DCA 2021)

After sustaining damage to her residence, Mitchell contacted Avatar to report a claim. A field inspection was arranged, and Avatar's adjuster responded to her home. The adjuster met with the loss consultant, retained by Mitchell. Thereafter, the adjuster prepared a post-loss report and photographed the interior and exterior of the residence, reporting his observations on each of the photographs. A dispute regarding coverage arose and Mitchell filed suit. Thereafter, she sought discovery of any and all photographs taken by Avatar of the property and all documents containing information regarding a statement by Mitchell of any time during Avatar's handling of Mitchell's loss, including adjuster notes, claims reports, interoffice memorandum, tape recordings and any transcripts or written statements from Mitchell. Avatar claimed work-product privilege and filed a privilege log. Following an *in camera* review, the trial court ordered production of both the report and unredacted photographs.

A Petition for Writ of Certiorari was filed. The Third District concluded that the materials ordered to be produced constituted work-product. The Plaintiff made no showing below of the exceptional circumstances required to justify disclosure of work product and, as a result, the Third District granted certiorari.

Thomas v. State Farm Florida Insurance Company, 314 So. 3d 653 (Fla. 3d DCA 2021)

Trillo and State Farm could not agree on the amount of a covered loss following a hurricane, so the claim proceeded to the contractual appraisal process. Trillo hired Scott Thomas and his company to serve as her appraiser during the process. The appraisers could not agree on an umpire and State Farm filed a petition to select an umpire in the trial court. Several months later, Trillo filed a motion to disqualify State Farm's appraiser, alleging that he was not a disinterested appraiser as required by the policy because he used to work for State Farm and "now derives a significant amount of his income serving as State Farm's appraiser." As a result of the insured's motion to disqualify Mr. Diaz, the trial court ordered State Farm to produce several documents pertaining to him, including a list of the number of appraisals in which State Farm named him as its appraiser during a three-year time period.

Subsequently, State Farm served a subpoena duces tecum on Mr. Thomas' company and requested nine categories of documents and also noticed him for deposition. Thomas filed a Motion for Protective Order and Objection to duces tecum. State Farm argued that it should be permitted access to his records to show that he had "generated the same amount" as Mr. Diaz but for insureds, rather than the insurance company. The trial court decided to apply the "goose/gander doctrine" and directed that Mr. Thomas produce all documents showing the total amount paid during the preceding three years. Thomas then filed a Petition for Certiorari and the Third District granted it finding that the trial court departed from the essential requirements of law in ordering the insured's appraiser to produce personal financial records which were irrelevant to the proceedings.

Ern v. Springer, 315 So. 3d 706 (Fla. 4th DCA 2021)

The Fourth District granted certiorari finding that the trial court departed from the essential requirements of the law by entering an order requiring production of the Plaintiff's mental health records without limitation, or without conducting an *in-camera* inspection to ensure that only relevant information was disclosed connecting the mental health records either in substance or time to the claim at issue. As such, the trial court was ordered to conduct an *in-camera* inspection to confirm that the records were relevant and timely as to the claim at issue.

National Fire & Marine Insurance Company v. Infinity Biscayne Myrtle Members, LLC, 316 So. 3d 766 (Fla. 3d DCA 2021)

The tenants of Infinity Biscayne were forced to limit their operations as a result of pandemic-related shut downs. Infinity then filed suit against National Fire seeking to recover lost revenue under an all-risk insurance policy. The Complaint consisted of five counts including: anticipatory breach of contract; breach of contract; breach of contract-civil authority coverage; breach of covenant of good faith and fair dealings; and bad faith. National Fire moved to dismiss the anticipatory breach count contending it did not constitute a claim under Florida law and also sought to dismiss the counts for breach of covenant of good faith and fair dealing and bad faith because they were premature as coverage issues had not yet been resolved. The Third District ruled that the anticipatory breach claim constituted a viable cause of action. They further noted that Florida does not recognize first-party common law bad faith claims. The court reviewed the Complaint and found that the claim for breach of covenant of good faith and fair dealing was essentially a claim for bad faith and thus, in the absence of coverage, this was premature. Despite the apparent prematurity, it also noted that there was a vast body of binding precedent

which precluded a finding of irreparable harm in the current procedural posture. As such, the Petition for Certiorari was denied.

City of Sweetwater v. Mejia, 316 So. 3d 769 (Fla. 3d DCA 2021)

The City filed a Petition for Certiorari from a series of orders of the trial court denying an extension of discovery past a court-imposed discovery cut-off. The District Court noted that denying a party to timely extension to obtain necessary, material discovery that, through no fault of its own, the party was unable to obtain during the discovery period may constitute a departure from the essential requirements of the law resulting in material harm that cannot be cured at the end of the case on appeal. In this case, a hearing transcript on a Motion for Summary Judgment on January 29, 2021 showed that the City actively opposed an extension sought by Mejia noting that "the deadline for fact discovery was today, and Plaintiff had very ample opportunity to do that and to proceed, but he chose not to." At some point after the trial court continued the Summary Judgment hearing, the Defendant City decided it needed additional discovery and filed a Joint Motion for Extension of Time later that same day. In the motion, the City never explained to the trial Judge why it needed the discovery, from whom it needed the discovery or why the relief from a court deadline would be appropriate under the circumstances. Instead, the motion provided boilerplate legal standards for such an extension. The trial court denied the Joint Motion for Extension. The Third District stated that "while the trial court could have granted the extension (and perhaps the better practice would have been to do so) we review only to determine if such denial constituted a departure from the essential requirements of the law. Based on the Petitioner's actions opposing an extension during the Summary Judgment hearing and the paucity of information presented to the trial Judge in the subsequent Motion to Extend the deadline and Motion for Reconsideration, "it concluded that the Order did not constitute a departure from the essential requirements of the law."

American Prime Title Services, LLC v. Wang, 317 So. 3d 1183 (Fla. 3d DCA 2021)

American Prime Title Services sought certiorari review of a lower court order denying a Motion to Compel Disclosure of Settlement Agreements executed between Wang and others in the proceeding below. American Prime asserted that the trial court's order effectively eviscerated its affirmative defense of setoff by denying it access to the settlement amounts prior to a finding of liability. The Third

District dismissed the petition for lack of jurisdiction because the Defendant failed to make a threshold showing of harm which could not be remedied on appeal.

Shimon v. R.B., 318 So. 3d 580 (Fla. 3d DCA 2021)

R.B. sued Shimon alleging he sexually battered her onboard his boat. R.B. reported the assault to three separate law enforcement agencies: the Hallandale Beach Police Department, the Miami-Dade County Police Department, and the Broward State Attorney's office. The Hallandale Beach Police closed their investigation because the Broward State Attorney declined to prosecute due to "the time delay and the victim's indecisiveness to come forward in the beginning, as well as jurisdictional issues". The Broward State Attorney never filed an information or formally charged Shimon.

Finding no reasonable danger of prosecution, the trial court entered a blanket order overruling Shimon's Fifth Amendment objection to discovery without addressing each category of the requested documents individually. The Order further provided that Shimon would be fined $1,000 for each day he failed to produce the documents after the expiration of 7 days. Shimon timely filed a Petition for Certiorari.

The Third District granted certiorari and found that the trial court departed from the essential requirements of the law by entering a blanket order overruling Shimon's Fifth Amendment objection. As the Third District noted, future prosecution of the action was not barred by the statute limitations; legal immunity from prosecution had not been granted; and the protection against double jeopardy had not been established.

In this case, the Broward State Attorney's decision not to prosecute was based in part on the conclusion that it had "no reasonable likelihood of conviction." As the Third District noted, "a discretionary decision not to prosecute because of a lack of evidence can be quickly reversed when new evidence comes to light. One can easily envision circumstances in which a disclosure made by Shimon could furnish a link in the chain of evidence needed to prove a crime against him and cause the law enforcement agencies to re-open their investigations." Further, they noted that the Broward State Attorney's decision not to prosecute did not prevent the Miami-Dade State Attorney from pursuing prosecution.

Onward Living Recovery Community v. Mormeneo, 319 So. 3d 115 (Fla. 3d DCA 2021)

The Third District granted certiorari and found that the trial court departed from the essential requirements of the law by requiring the Defendant to produce root cause analysis and incident reports after finding that these reports were prepared in the ordinary course of business and constituted non-privileged, discoverable business records or, alternatively, that any work product privilege was waived because the corporate representative used the reports at her deposition. The Third District pointed out that the fact that the Defendant required that records be created after a "sentinel event" supports the contention that the documents were created in anticipation of litigation.

Further, with respect to the conclusion that any privilege was waived by the corporate representative's reference to these documents during her deposition, on remand the trial court was to conduct an *in-camera* inspection to determine whether the references to the documents were such that the privilege was waived and if so, to determine with specificity the extent of the waiver. Further, to the extent that the trial court on remand determines that some or all of the records are protected from discovery, an evidentiary hearing will be required to determine whether the reports contained information that was unobtainable elsewhere without undue hardship.

Central Concrete Supermix, Inc. v. Cancio, 319 So. 3d 742 (Fla. 3d DCA 2021)

The Defendant sought to take the deposition of Plaintiff's former counsel and the trial court quashed the subpoena and issued a protective order to prohibit the deposition. The Third District denied certiorari and found the trial court's actions were appropriate where the Defendant failed to allege or establish that no other means existed to obtain the information sought.

Quinn v. CCRC OPCO FREEDOM SQUARE LLC, 320 So. 3d 300 (Fla. 2d DCA 2021)

The decedent was a resident at an Assisted Living Facility (ALF). After she passed away, her Estate sued the ALF alleging negligence and wrongful death. Relying upon the terms of its residency agreement, the ALF moved to compel arbitration. The agreement provided that the parties had 20 days after a demand for arbitration to either agree on a solo arbitrator or to each choose a nominator who would thereafter choose the sole arbitrator. Near the end of the selection period, the

Estate proposed two potential arbitrators. On the last day of the selection, the ALF responded, rejected both of the Estate's proposed arbitrators and suggested three others to serve as the lone arbitrator. Before the close of business on the same day, the Estate replied rejecting the ALF's three suggestions and selected one person to serve as arbitrator pursuant to the agreement. The ALF did not respond until the following day; after the expiration of the selection period.

Months later, the ALF moved to compel the Estate to select an arbitrator contending that "although each counsel timely suggested proposed arbitrators, they could not agree on the selection of the sole arbitrator." Without specifying when, the ALF also asserted that it had already identified its chosen nominator but represented that the Estate had yet to complete the selection process. The Estate responded and asserted that it timely selected its arbitrator under the agreement and that it was the ALF that did not select their arbitrator within the 20-day period. As such, it contended that the ALF had forfeited its right to select any arbitrator.

At the hearing on the ALFs Motion to Compel the Estate to select an arbitrator, the ALF conceded that its Motion to Compel arbitration had constituted a demand for arbitration that "started the 20-day process" and it also conceded that it did not select an arbitrator within the period whereas the Estate had done so. Nonetheless, the ALF asserted that because the parties had not reasonably exhausted discussions of selecting a lone arbitrator by the deadline, the trial court should require the Estate to propose another nominator.

The trial court focused on the fact that the Estate's correspondence selecting its arbitrator was transmitted at 4:40 p.m. on the day of the deadline. The court criticized the Estate for sending the correspondence at that time on the day when they were tasked with coming to an agreement or not. The trial court then gave the ALF the unilateral choice between either selecting a nominator or letting the court pick an arbitrator. After the ALF stated that it preferred to pick a nominator, the trial court entered an order directing the parties to each select a nominator. The Second District concluded that the trial court departed from the essential requirements of the law in re-writing the parties' agreement in the Defendants favor by allowing the Defendant to choose a nominator despite having forfeited its right by missing the express deadline in its own residency agreement. It further noted that the trial court's conclusion that the Plaintiff's arbitrator selection was somehow impermissible because it was transmitted near the end of the business day on the day it was due was not supported by the agreement or any legal authority. That said, the Second District denied certiorari finding that the Plaintiff could not establish irreparable harm because the Plaintiff will be able to challenge the eventual arbitration award on appeal.

LE-1, LLC v. Trower, 320 So. 3d 1176 (Fla. 2021)

The Circuit Court ordered LE-1 to transport its original corporate documents responsive to Trower's Request for Production from California. Trower was to pay the transportation costs. LE-1 filed a Petition for Certiorari. The Third District denied the petition to the extent that it sought to quash the court's order requiring production of the documents but granted the petition and quashed that portion of the order which required LE-1 to transport original corporate documents from California to Trower's counsel in Florida. Typically, business records are to be examined for discovery at the owner's place of business during reasonable business hours unless the parties mutually agree to some other place and time.

South Broward Hospital District v. Feldbaum, 321 So. 3d 828 (Fla. 4th DCA 2021)

Feldbaum held privileges at South Broward's hospitals. They similarly suspended his staff privileges following which Feldbaum agreed to attend a third-party fit-for-duty program at Acumen. He completed the evaluation and sought reinstatement of his privileges. South Broward's credential's committee and medical executive committee considered his application for reinstatement but upheld his suspension. He then sued South Broward for upholding his suspension for "economic motivations" rather than concern for patient safety. After filing suit, he served South Broward with a Request for Production for minutes of credentialing committees, recredentialing committees, medical executive committees and any other group relating to his suspension; correspondence between these committees and any third parties relating to the suspension; and communication between South Broward and Acumen. South Broward objected to each request arguing that the documents were protected by the statutory peer review and credentialing discovery immunities of Florida Statute §395.0193(8) and provided the documents to the trial court for an *in-camera* inspection. The trial court found that the documents were protected; however, it concluded that the privilege had been waived as to certain documents and ordered production of correspondence between Feldbaum and the hospital; the Acumen report along with peer review and credentialing documents provided to Acumen; and portions of South Broward's internal credentialing file. The Fourth District found that the trial court properly found that the documents were protected by Florida Statute §395 but had mistakenly concluded that South Broward had somehow waived the discovery immunity and that the fact that certain documents had already been provided to Feldbaum had no impact on the discovery immunity provided by §395.0191(8) and §395.0193(8). As such, the Fourth District held that the trial court departed from the essential requirements of law by requiring the production of the protected documents and that loss of the statutory protection

could not be remedied on direct appeal because use of the documents against the hospital could not then be cured.

Hidalgo v. Citizens Property Insurance Corp., 323 So. 3d 338 (Fla. 3d DCA 2021)

The trial court entered an order directing the Plaintiff's expert engineer to produce financial and business records which included a list of cases with the money received over the past three years from the law firm representing the Plaintiffs or any attorney associated with that firm. The Third District granted certiorari noting that "discovery to explore the potential bias of an expert witness requires a showing of 'the most unusual or compelling circumstances.'" Because the record below demonstrated no such circumstances and no such findings by the trial court, certiorari was granted.

American Home Assurance Company, Inc. v. Sebo, 324 So. 3d 977 (Fla. 2d DCA 2021)

Sebo purchased a home in April 2005. American Home provided homeowner's insurance to him. In December 2005, he filed a claim for water intrusion and other damage to the home and American Home denied coverage for most of the claimed losses. Sebo then filed a lawsuit against a number of Defendants and in November 2009 amended his Complaint to add American Home as a Defendant seeking a declaration that the policy provided coverage for his damages. After settling his claims against the majority of the other Defendants, Sebo proceeded to trial in his declaratory action against American Home. The jurors found in favor of Sebo and the trial court entered judgment against American Home. Appeals followed and ultimately the Florida Supreme Court affirmed the jury verdict finding that the "concurrent cause" doctrine applied.

Sebo then initiated his first-party bad faith action and served a Request for Production seeking various documents related to the denial of the claim. At issue were documents created before the final judgment was entered and American Home objected based upon work product and attorney/client privilege. The Second District noted that the Supreme Court's decision in *Allstate Indemnity Company v. Ruiz*, 899 So. 2d 1121 (Fla. 2005) found that the work product doctrine does not apply to documents prepared in connection with the evaluation of the underlying insurance claim and such documents are not shielded from discovery because the claim's materials are needed to determine whether the insurance company acted in bad faith. *Ruiz* did not, however, address attorney/client privilege.

As the district court noted, attorney/client privilege differs because it is a statutorily protected privilege of confidentiality and is not concerned with the litigation needs of the opposing party. There are potential exceptions to the attorney/client privilege in bad faith cases when an insurer raises the advice of its counsel as a defense in an action and when the insurance company has hired an attorney to both investigate an underlying claim and give legal advice. Because of these exceptions, the Second District granted certiorari and held that the trial court must conduct an *in camera* inspection to determine if the materials at issue were truly protected by attorney/client privilege.

American Integrity Insurance Company v. Venable, 324 So. 3d 999 (Fla. 1st DCA 2021)

Venable filed a Complaint alleging that American Integrity breached their homeowner's insurance policy by denying coverage and failing to pay for losses arising from water damage to their home. Venable filed a Request to Produce, and the insurance company objected on grounds of overbreadth and privilege. The trial court eventually overruled the insurance company's objection to producing its underwriting file. The offered to provide the underwriting file to the court for an *in camera* review and the trial court denied this offer and overruled the objection without giving the insurance company a chance to file a privilege log.

The First District granted certiorari and held that the trial court departed from the essential requirements of law by compelling American Integrity to produce certain documents contained in its underwriting file without allowing it a reasonable time to file a privilege log addressing the subject documents and conducting an *in camera* inspection of the documents for which it asserted a claim of privilege or confidentiality.

Keen v. Jennings, 327 So. 3d 435 (Fla. 5th DCA 2021)

The trial court granted Plaintiff leave to amend to add a claim for punitive damages. The Fifth District quashed this order finding that the Plaintiff failed to plead a facially sufficient basis for a punitive damage claim. The Fifth District noted that although the general rule that such an order is not typically reviewable by certiorari does not apply here because a facially insufficient pleading for punitive damages authorizes or allows intrusive financial discovery that would be otherwise impermissible.

Brinkmann v. Petro Welt Trading, 327 So. 3d 918 (Fla. 2d DCA 2021)

The Defendants turned over some documents in discovery but filed a privilege log with regard to others. The non-parties, all of whom were represented by the same attorney, who was representing the Defendants, also turned over documents and voluntarily filed privilege logs as to other requests. The Plaintiffs argued that all of the privilege logs were insufficient because they failed to accurately describe the documents withheld. A Motion to Compel was referred to a General Magistrate who overruled the privilege objections. With regard to the non-parties, the Magistrate ordered them to produce all withheld and redacted documents referencing the privilege log, because they failed to establish a basis for the privilege in the logs. The Defendants filed exceptions to the report and recommendation, but the non-parties did not. At the hearing, counsel argued that the exceptions applied to both the non-parties and the parties because counsel represented the non-parties as well. The trial court affirmed the Magistrate's recommendations which found that many of the asserted privileges were unrecognized by Florida law and were items the non-parties simply wanted to keep confidential. As a result, the non-parties filed a Petition for Writ of Certiorari. The District Court noted that the accountant/client and attorney/client privileges have long been recognized and it was unclear as to whether the Magistrate had considered that the privileges had been properly raised, therefore, the trial court departed from the essential requirements of law by overruling those privileges without any findings or analysis.

Andreatta v. Brown, 330 So. 3d 589 (Fla. 1st DCA 2021)

In granting certiorari involving an alleged claim of privilege, the First District noted that Rule of Civil Procedure 1.280(b)(6) does not use the word "log" or require any specific form for a "privilege log." Instead, a party must only make the privilege claim expressly and describe the nature of the documents, communication or things not produced or disclosed in a manner that will enable the other parties to assess the applicability of the privilege or the protection. If a party fails to supply adequate information, then the trial court may find a waiver of attorney/client privilege adding that while waiver is within the court's discretion, a waiver finding is not favored. Here, the Petitioner's counsel repeatedly e-mailed Respondent's counsel that he redacted attorney/client communications explaining that his clients had forwarded emails to him that were responsive to the discovery requests and apparently included discussion about those emails when they forwarded them. The Respondents moved to compel and requested a privilege log for any documents redacted on privilege grounds. After a hearing but without an *in camera* inspection of the emails, the trial

court found that the lack of a privilege log constituted a waiver of the attorney/client privilege. The First District found this was an abuse of discretion and a departure from the essential requirements of law and issued a writ of certiorari.

Whittington v. Whittington, 331 So. 3d 278 (Fla. 1st DCA 2021)

The First District granted certiorari and held that the trial court departed from the essential requirements of the law by ordering the petitioner to produce her personal and mental health records without determining if the Petitioner had waived her privilege to said records. The trial court also departed from the essential requirements of the law by failing to require an *in camera* review of the records. The First District found that the harm caused by the erroneous production of the Petitioner's records could not be remedied on appeal and constituted irreparable harm.

Younkin v. Blackwelder, 46 FLWS 291 (Fla. 10/14/21)

The Plaintiff requested certain information regarding the financial relationship between the Defendant's law firm and the defense's medical expert. The Defendant moved for a Protective Order, but the trial court denied the motion. The Defendant then filed a Petition for Writ of Certiorari which was denied; however, the Fifth District was concerned that the law in the area was not being applied in an even-handed manner to all litigants and certified the question as to whether the Supreme Court's decision in *Worley v. Central Florida Young Men's Christian Association,* 228 So. 3d 18 (Fla. 2017) should be applied to the discoverability of the financial information at issue. The Supreme Court re-worded the certified question to read "whether it is a departure from the essential requirements of law to permit discovery regarding the financial relationship between a Defendant's non-party law firm and an expert witness retained by the defense?" The Supreme Court answered the question in the negative. It should be noted that 6 out of 7 of the justices signed on to the majority opinion.

Moss & Associates, LLC v. Lapin, 46 FLWD 2316 (Fla. 3d DCA 10/27/21)

Certiorari review is unavailable where the trial court complied with the procedural requirements of Florida Statute §768.72 and the trial court entered an

order finding that the evidentiary proffer in support of the claim for punitive damages was sufficient to support the claim.

IMC Hospitality, LLC v. Ledford, 46 FLWD 2460 (Fla. 3d DCA 11/17/21)

The Plaintiff slipped inside a restaurant. During litigation, the Plaintiff sought the production of the in-house incident report, along with photographs of the accident scene. The Defendant objected because the incident report and photographs were prepared in anticipation of litigation and thus were allegedly protected by the work-product privilege. The parties presented competing Affidavits where the Plaintiff and the restaurant's assistant manager both attested that they had authored the incident report in question. The trial court held an evidentiary hearing and conducted an in-camera inspection ultimately ordering the production of the incident report and the photographs. As to the incident report, the trial court found the Plaintiff more credible and also found that the Plaintiff had met the requirements of Florida Rule of Civil Procedure 1.280(b)(4) because the statement had been made by the Plaintiff himself. The Third District ruled, however, that the work-product privilege still protected production of the photographs that were taken and issued a writ of certiorari as to the production of those photographs.

Adkins v. Sotolongo, 46 FLWD 2461 (Fla. 3d DCA 11/17/21)

After a hearing, the trial court concluded that the physician witness' relevant medical records had been turned over to the Plaintiff based upon her signature and request for those records and that the non-party physician could refuse to be deposed because there was no prima facie case established for the need of the deposition. The Third District noted that the trial court possesses significant discretion in regulating discovery under Florida Rule of Civil Procedure 1.280(c). Moreover, the Plaintiff failed to show an irreparable harm stemming from the challenged order because the medical file produced was produced in its entirety to the Plaintiff.

Winn-Dixie Stores, Inc. v. Lopez, 46 FLWD 2570 (Fla. 3d DCA 12/1/21)

After an *in-camera* inspection, the trial court concluded that two portions of the incident report contained the Plaintiff's statements must be produced because the trial court believed they contained statements made directly by the Plaintiff. Winn-Dixie argued that the Plaintiff had made no showing that she was in need for these

materials and was unable to obtain them or the substantial equivalent without undue hardship. In response, the Plaintiff correctly noted that no showing of undue hardship was necessary to obtain a party's own statement. That said, to qualify as a witness statement under Rule 1.280, the statement must be written, and signed or otherwise adopted or approved by the person making it, or it must be a stenographic, mechanical, electrical, or other recording or transcription that is substantially verbatim of the oral statement the person made and was contemporaneously recorded. The Third District found that the incident report did not contain a statement made by the Plaintiff herself because there was no signature and no other evidence of adoption or approval by the Plaintiff. As such, the Third District concluded Plaintiff was not entitled to production under the Rule and certiorari was granted.

Superior Auto Glass of Tampa Bay, Inc. v. Government Employees Insurance Company, 46 FLWD 2601 (Fla. 2d DCA 12/8/21)

The trial court order granted GEICO's appellate attorney's fees but stated that it was conditioned upon it prevailing in the underlying proceeding; however, GEICO's entitlement to attorney's fees was based upon the offer of settlement statute. The Second District quashed the trial court's order and granted certiorari pointing out that the offer of settlement statute requires a party seeking an award of attorney's fees to satisfy a number of requirements independent of prevailing at trial. As such, it was a departure from the essential requirements of the law to condition the awarded fees on prevailing at trial, instead of GEICO satisfying all the requirements of the offer of settlement statute.

Default

Ace Funding Source, LLC v. A-1 Transportation Network, Inc., 314 So. 3d 726 (Fla. 3d DCA 2021)

The Third District reversed the trial court and held that it abused its discretion in denying a Motion to Vacate a Clerk's Default where, prior to entry of the default, there was correspondence between counsel for the parties that indicated that the Defendant was represented by counsel and that the Defendant intended to defend the suit.

College Health II, GP, Inc. v. Depau, 46 FLWD 2327 (Fla. 3d DCA 10/27/21)

The trial court did not abuse its discretion in denying Defendant's Motion to Vacate Default after determining that Plaintiff's counsel was unaware of Defendant's intentions to defend against this claim. The Third District noted that the line of cases holding that a default must be lifted if the Plaintiff's attorney is aware that the defaulting Defendant is represented by counsel also requires actual knowledge that the defaulting party intends to defend against the lawsuit.

Defendant's medical records

Tanner v. Hart, 313 So. 3d 805 (Fla. 2d DCA 2021)

Hart sued Tanner in 2018, alleging negligence in connection with a 2014 automobile accident that occurred when Tanner was 79-years old. In 2019, Hart sought to depose Ms. Tanner who was then in hospice care and suffering memory loss associated with dementia as confirmed by two of her physicians. After learning of her diagnosis and her inability to be deposed, Hart sought production of Tanner's medical records. The request for "any and all" records was objected to by Tanner claiming an invasion of her right to privacy, overbreadth and sought information that was irrelevant to the issues framed by the pleadings; that is whether Tanner was negligent in 2014.

The trial court initially sustained the objections finding that Tanner's medical condition was not at issue and concluding that the disclosure of the records would violate her right to privacy. The trial court later granted Plaintiff's request for reconsideration and directed production of the records from December 2011 through April 2020. The trial court did not examine the records *in camera*, but rather directed the parties to execute a confidentiality agreement.

The Second District granted certiorari ruling that the trial court departed from the essential requirements of law by compelling disclosure of nearly 10 years' worth of inclusive medical information without first determining its relevance and balancing the need for such information against Tanner's privacy interests. The court further pointed out that the confidentiality agreement did not affect this conclusion because "medical records may not be disclosed to opposing parties, or their counsel until after the trial court reviews the records *in camera* to determine their relevance.

Deposition of non-party physician

Adkins v. Sotolongo, 46 FLWD 2461 (Fla. 3d DCA 11/17/21)

After a hearing, the trial court concluded that the physician witness' relevant medical records had been turned over to the Plaintiff based upon her signature and request for those records and that the non-party physician could refuse to be deposed because there was no prima facie case established for the need of the deposition. The Third District noted that the trial court possesses significant discretion in regulating discovery under Florida Rule of Civil Procedure 1.280(c). Moreover, the Plaintiff failed to show an irreparable harm stemming from the challenged order because the medical file produced was produced in its entirety to the Plaintiff.

Deposition of prior counsel

Central Concrete Supermix, Inc. v. Cancio, 319 So. 3d 742 (Fla. 3d DCA 2021)

The Defendant sought to take the deposition of Plaintiff's former counsel and the trial court quashed the subpoena and issued a protective order to prohibit the deposition. The Third District denied certiorari and found the trial court's actions were appropriate where the Defendant failed to allege or establish that no other means existed to obtain the information sought.

Expert's financial information

Thomas v. State Farm Florida Insurance Company, 314 So. 3d 653 (Fla. 3d DCA 2021)

Trillo and State Farm could not agree on the amount of a covered loss following a hurricane, so the claim proceeded to the contractual appraisal process. Trillo hired Scott Thomas and his company to serve as her appraiser during the process. The appraisers could not agree on an umpire and State Farm filed a petition to select umpire in the trial court. Several months later, Trillo filed a motion to disqualify State Farm's appraiser, alleging that he was not a disinterested appraiser as required by the policy because he used to work for State Farm and "now derives a significant amount of his income serving as State Farm's appraiser." As a result of the insured's motion to disqualify Mr. Diaz, the trial court ordered State Farm to produce several documents pertaining to him, including a list of the number of appraisals in which State Farm named him as its appraiser during a three-year time period.

Subsequently, State Farm served a subpoena duces tecum on Mr. Thomas' company and requested nine categories of documents and also noticed him for deposition. Thomas filed a Motion for Protective Order and Objection to duces tecum. State Farm argued that it should be permitted access to his records to show that he had "generated the same amount" as Mr. Diaz but for insureds, rather than the insurance company. The trial court decided to apply the "goose/gander doctrine" and directed that Mr. Thomas produce all documents showing the total amount paid during the preceding three years. Thomas then filed a Petition for Certiorari and the Third District granted it finding that the trial court departed from the essential requirements of law in ordering the insured's appraiser to produce personal financial records which were irrelevant to the proceedings.

Hidalgo v. Citizens Property Insurance Corp., 323 So. 3d 338 (Fla. 3d DCA 2021)

The trial court entered an order directing the Plaintiff's expert engineer to produce financial and business records which included a list of cases with the money received over the past three years from the law firm representing the Plaintiffs or any attorney associated with that firm. The Third District granted certiorari noting that "discovery to explore the potential bias of an expert witness requires a showing of 'the most unusual or compelling circumstances.'" Because the record below demonstrated no such circumstances and no such findings by the trial court, certiorari was granted.

Younkin v. Blackwelder, 46 FLWS 291 (Fla. 10/14/21)

The Plaintiff requested certain information regarding the financial relationship between the Defendant's law firm and the defense's medical expert. The Defendant moved for a Protective Order, but the trial court denied the motion. The Defendant then filed a Petition for Writ of Certiorari which was denied; however, the Fifth District was concerned that the law in the area was not being applied in an even-handed manner to all litigants and certified the question as to whether the Supreme Court's decision in *Worley v. Central Florida Young Men's Christian Association,* 228 So. 3d 18 (Fla. 2017) should be applied to the discoverability of the financial information at issue. The Supreme Court re-worded the certified question to read "whether it is a departure from the essential requirements of law to permit discovery regarding the financial relationship between a Defendant's non-party law firm and an expert witness retained by the defense?" The Supreme Court answered the question in the negative. It should be noted that 6 out of 7 of the justices signed on to the majority opinion.

Fabre

Crime v. Looney, 328 So. 3d 1157 (Fla. 1st DCA 2021)

The First District held that the trial court erred by interpreting the judicially created rear-end presumption in vehicle collision cases to defeat the Defendant's claim of comparative fault. Because there was admissible evidence that the Defendant was not the sole cause of the accident, the presumption should not have been utilized. The First District also found that the trial court erred in finding that the comparative fault defense was unavailable to the Defendant because she could not specifically identify the non-party she sought to allocate fault to. the First District noted that Florida Statute §768.81(3)(a)(1) states that a Defendant only need "describe the nonparty as specifically as practicable" when the non-party's identify is not known.

Fifth Amendment

Shimon v. R.B., 318 So. 3d 580 (Fla. 3d DCA 2021)

R.B. sued Shimon alleging he sexually battered her onboard his boat. R.B. reported the assault to three separate law enforcement agencies: the Hallandale Beach Police Department, the Miami-Dade County Police Department, and the Broward State Attorney's office. The Hallandale Beach Police closed their investigation because the Broward State Attorney declined to prosecute due to "the time delay and the victim's indecisiveness to come forward in the beginning, as well as jurisdictional issues". The Broward State Attorney never filed an information or formally charged Shimon.

Finding no reasonable danger of prosecution, the trial court entered a blanket order overruling Shimon's Fifth Amendment objection to discovery without addressing each category of the requested documents individually. The Order further provided that Shimon would be fined $1,000 for each day he failed to produce the documents after the expiration of 7 days. Shimon timely filed a Petition for Certiorari.

The Third District granted certiorari and found that the trial court departed from the essential requirements of the law by entering a blanket order overruling Shimon's Fifth Amendment objection. As the Third District noted, future prosecution of the action was not barred by the statute limitations; legal immunity

from prosecution had not been granted; and the protection against double jeopardy had not been established.

In this case, the Broward State Attorney's decision not to prosecute was based in part on the conclusion that it had "no reasonable likelihood of conviction." As the Third District noted, "a discretionary decision not to prosecute because of a lack of evidence can be quickly reversed when new evidence comes to light. One can easily envision circumstances in which a disclosure made by Shimon could furnish a link in the chain of evidence needed to prove a crime against him and cause the law enforcement agencies to re-open their investigations." Further, they noted that the Broward State Attorney's decision not to prosecute did not prevent the Miami-Dade State Attorney from pursuing prosecution.

Forum non conveniens

Fasang-Brown v. Visit Us, Inc., 319 So. 3d 132 (Fla. 3d DCA 2021)

The Third District upheld the trial court's dismissal of a premises liability claim based upon *forum non conveniens* even though the Defendant corporation was domiciled in Plaintiff's chosen forum where the Plaintiff's premises liability claim concerned an alleged joint venture to operate a hotel in Jamaica; the Plaintiff received initial medical treatment in Jamaica; and an alleged third party Defendant was answerable only in the courts of Jamaica. Further, there was no action in the case which occurred in Florida and no witnesses or personal damages connected to Florida.

Fraud on the Court

Salazar v. Gomez, 317 So. 3d 170 (Fla. 3d DCA 2021)

Salazar was a 23-year old body builder and personal trainer who was involved in a motor vehicle accident and sustained neck injuries requiring surgery due to a herniated disc. During his deposition, he disclosed that he had previously been involved in a minor accident in 2014, but that he did not sustain any injuries nor receive any treatment following that accident. While he testified that he had sustained injuries when competing for CrossFit, and that he had received physical therapy for sports-related muscle aches, at deposition he denied having been treated by an orthopedic surgeon.

The week before trial, defense counsel received medical records which, on their face, appeared to contradict Salazar's prior testimony. The records showed that Salazar had previously seen an orthopedic surgeon and received treatment for neck and back pain. Defense counsel did not seek a continuance to conduct more discovery, did not request an updated deposition, and did not bring any pretrial motions regarding the alleged late discovery or inconsistency in Salazar's testimony. Instead, the case proceeded to trial.

During trial, defense counsel confronted Salazar with the alleged inconsistencies in his testimony, as well as the prior medical records. Salazar explained that he may have misspoken regarding prior treatment by an orthopedic surgeon and maintained that his prior chiropractic treatment was related to fitness activities and not any accident. After the jury found the Defendant 61% negligent and awarded Salazar past and future medical expenses, the Defendant filed a Motion to Dismiss for Fraud, and/or a Motion for New Trial re-alleging only the same inconsistencies in Salazar's testimony which was presented to the jury. The trial court ultimately granted the Motion to Dismiss for Fraud and dismissed the case with prejudice.

The Third District reversed noting that, following the verdict, the Defendant did not present any new evidence to the Court in support of his Motion to Dismiss. Further, the trial court did not hold an evidentiary hearing on the motion and no additional evidence was introduced demonstrating that the Plaintiff perpetrated a fraud on the Court which had not previously been submitted to the jury during trial. Accordingly, they held that the trial court abused its discretion in overturning the verdict and dismissing the case and reversed and remanded with directions to enter judgment for the Plaintiff.

Incident report

Winn-Dixie Stores, Inc. v. Lopez, 46 FLWD 2570 (Fla. 3d DCA 12/1/21)

After an *in-camera* inspection, the trial court concluded that two portions of the incident report contained the Plaintiff's statements must be produced because the trial court believed they contained statements made directly by the Plaintiff. Winn-Dixie argued that the Plaintiff had made no showing that she was in need for these materials and was unable to obtain them or the substantial equivalent without undue hardship. In response, the Plaintiff correctly noted that no showing of undue hardship was necessary to obtain a party's own statement. That said, to qualify as a

witness statement under Rule 1.280, the statement must be written, and signed or otherwise adopted or approved by the person making it, or it must be a stenographic, mechanical, electrical, or other recording or transcription that is substantially verbatim of the oral statement the person made and was contemporaneously recorded. The Third District found that the incident report did not contain a statement made by the Plaintiff herself because there was no signature and no other evidence of adoption or approval by the Plaintiff. As such, the Third District concluded Plaintiff was not entitled to production under the Rule and certiorari was granted.

Joinder

Security National Insurance Company v. Gonzalez, 46 So. 3d 679 (Fla. 2d DCA 2021)

The Second District held that the trial court erred in joining the insurance company in an action against the insured for purpose of enforcement of the judgment against the insured for bodily injury damages where the insured had rejected bodily injury coverage. The fact that the insurance company provided a "courtesy defense" of the personal injury claim after it had resolved the property damage claim did not create coverage for personal injury by equitable estoppel.

Medical bills

Osceola County Board of County Commissioners v. Sand Lake Surgery Center, LLC, 320 So. 3d 950 (Fla. 5th DCA 2021)

The Plaintiffs claim they were injured when an elevator in the County's parking garage malfunctioned. Both were treated pursuant to letters of protection at Sand Lake. Rather than wait for the outcome of the Plaintiff's cases, Sand Lake sold the Plaintiffs' accounts receivables to American Medical Funding (AMF) which is a factoring company. The county used non-party production subpoenas to request Sand Lake to provide documents related to the Plaintiffs including their medical records, billing records, payments of their bills and records related to any sale of Plaintiffs' outstanding accounts to third parties.

Neither of the Plaintiffs objected to the subpoenas and Sand Lake responded to the subpoena by advising it had sold the Plaintiffs outstanding accounts to AMF and suggested that they obtain those records from AMF. The county then followed up by scheduling the deposition duces tecum of the Surgical Center's designated corporate representative and again requested similar documents. Neither Plaintiff

objected and the Surgery Center provided medical treatment and billing records but stated that it was unable to provide documents related to payments or records reflecting the sale or transfer of any bills owed by the Plaintiffs because such information was subject to trade secret and confidentiality provisions and that a violation of this would subject Sand Lake to significant damages.

Eventually, a hearing was held and the trial court sustained the Surgical Center's objections. The Fifth District reversed and held that when a healthcare facility treats a personal injury Plaintiff, the Defendant being sued is entitled to discover the amount of the original medical bills and any discounts agreed upon when the healthcare facility sells the unpaid accounts to a factoring company because that information is relevant when the Plaintiff seeks to recover medical expenses as part of the lawsuit against the Defendant. The court also pointed out that the non-party respondents failed to carry their burden with establishing that the information sought was trade secret.

Mental health records

Ern v. Springer, 315 So. 3d 706 (Fla. 4th DCA 2021)

The Fourth District granted certiorari finding that the trial court departed from the essential requirements of the law by entering an order requiring production of the Plaintiff's mental health records without limitation, or without conducting an *in-camera* inspection to ensure that only relevant information was disclosed connecting the mental health records either in substance or time to the claim at issue. As such, the trial court was ordered to conduct an *in-camera* inspection to confirm that the records were relevant and timely as to the claim at issue.

Whittington v. Whittington, 331 So. 3d 278 (Fla. 1st DCA 2021)

The First District granted certiorari and held that the trial court departed from the essential requirements of the law by ordering the petitioner to produce her personal and mental health records without determining if the Petitioner had waived her privilege to said records. The trial court also departed from the essential requirements of the law by failing to require an *in camera* review of the records. The First District found that the harm caused by the erroneous production of the Petitioner's records could not be remedied on appeal and constituted irreparable harm.

Motion to Dismiss

Rhiner v. Koyama, 327 So. 3d 314 (Fla. 4th DCA 2021)

While in prison, Rhiner was attacked by other inmates which resulted in lacerations and a fractured jaw. He was brought to a hospital where his lacerations were sutured and stapled. Following the treatment, he was transferred to Lawnwood Regional Medical Center where Koyama performed oral surgery on his fractured jaw.

The Plaintiff filed a Complaint for medical malpractice against multiple Defendants including Lawnwood and Koyama. The Plaintiff alleged in his Complaint that he complied with the presuit notice requirements of Florida Statute §766.106. Koyama moved to dismiss the Complaint stating that he had not been served with the presuit notice within the two-year statute of limitations. Rhiner contended that he served the presuit notice on Lawnwood and argued that such service imputed notice to Koyama. Rhiner attached several exhibits to his response. One exhibit contained certified mail receipts which appeared to demonstrate that two presuit notices were mailed to Lawnwood's address; one directed to the hospital, and one directed to Koyama. Another exhibit depicted a completed authorization for release form that was directed to Koyama and listed his correct address.

At the hearing on the Motion to Dismiss, during which no evidence was taken, Koyama argued that the Complaint must be dismissed arguing that the presuit notice to Lawnwood did not impute notice to him because a legal relationship between the two did not exist. Specifically, Koyama asserted that he was not Lawnwood's employee but had merely been granted privileges at the hospital. Second, Koyama argued that the exhibits attached to Rhiner's response demonstrated that the pre-suit notice was not accompanied by the authorization for release of medical records and therefore the presuit notice must be deemed void. The trial court agreed with both arguments and dismissed the Complaint against Koyama with prejudice.

The Fourth District reversed noting that the trial court went beyond the four corners of the Complaint and made factual findings based upon assertions and exhibits attached to Rhiner's response. The factual question of whether a legal relationship existed between Koyama and the hospital and whether the pre-suit notice accompanied the authorization for release of medical records were matters beyond the four corners of the Complaint which required submission of evidence.

DeSantis v. F.C. Lending Sunshine, LLC, 328 So. 3d 374 (Fla. 2d DCA 2021)

The Defendant filed a Motion to Dismiss which the trial court granted and dismissed the action with prejudice. The Second District reversed finding that it was error to grant the Motion to Dismiss with prejudice where the Plaintiff was not afforded the opportunity to amend his Complaint once as a matter of course pursuant to Florida Rule of Civil Procedure 1.190(a). The Second District also noted that the trial court lacks discretion to dismiss an action with prejudice even where it seems that amending the Complaint would be futile.

Non-binding arbitration

Gambrel v. Sampson, 330 So. 3d 114 (Fla. 2d DCA 2021)

Sampson filed suit as a result of injuries sustained in an accident involving Gambrell. After engaging in discovery, the parties agreed to submit the case to non-binding arbitration pursuant to Florida Statute §44.103. The arbitrator found in favor of Sampson but did not award her any damages other than her past medical expenses. The award was signed on December 8, 2020 and served that same day by electronic mail on the parties' respective lawyers. An email of the award was also sent to a paralegal who worked for Ms. Sampson's counsel. The paralegal later confirmed that she received the email of the award on December 8 but did not read it until the following day. After reading the concluding paragraph of the award which stated, "if demand for a trial is not filed pursuant to Rule 1.830, Florida Rule of Civil Procedure, within 20 days of service of this award, a civil judgment will be entered embodying the terms of the award." The paralegal then calendared the deadline to file a demand for trial 20 days later but did so from the date she had read the award and not the date it had been served.

When no party requested a trial *de novo* within the 20-day deadline, Gambrell filed a motion for entry of a judgment on December 29. Later that day, Sampson filed a motion seeking a trial *de novo* on her negligence Complaint. The Circuit Court held an evidentiary hearing and eventually allowed the Plaintiff to demand a trial finding that the paralegal's mistake was due to "an excusable and reasonable misunderstanding." The Defendant then filed a Petition for Writ of Mandamus which the Second District issued concluding that the trial court had no discretion to refuse to enter a judgment under the statute noting that the trial court's attempt to graft an excusable neglect exception into the statute and rule where none existed was unauthorized.

Pleading conditions precedent

Saavedra v. Universal Property & Casualty Insurance Company, 314 So. 3d 729 (Fla. 5th DCA 2021)

In its answer to Saavedra's Complaint, Universal alleged that he failed to satisfy all conditions precedent to recover pursuant to the terms of the policy. Ultimately, Universal filed a Motion for Summary Judgment arguing that Saavedra did not comply with the terms of the policy and argued that he failed to promptly report the loss, failed to show the damage sustained before making repairs and failed to provide any records or documents sought by Universal in order to investigate the claim. In response to the motion, Saavedra argued in part that the motion should have been denied because Universal failed to plead non-compliance with conditions precedent with specificity as required by FRCP 1.120(c).

The Fifth District held that by not alleging with specificity the manner in which Saavedra failed to satisfy the conditions precedent, Universal failed to comply with FRCP 1.120(c), thereby waiving its defense that Saavedra failed to comply with the conditions precedent. Because the failure to satisfy conditions precedent was the basis for its summary judgement, the District Court reversed and remanded.

Privilege log

The Hertz Corporation v. Sider, 311 So. 3d 1004 (Fla. 2d DCA 2021)

A claim of work-product protection or attorney-client privilege is not mature for appellate review when a privilege log has not yet been filed. As such, certiorari was denied.

Andreatta v. Brown, 330 So. 3d 589 (Fla. 1st DCA 2021)

In granting certiorari involving an alleged claim of privilege, the First District noted that Rule of Civil Procedure 1.280(b)(6) does not use the word "log" or require any specific form for a "privilege log." Instead, a party must only make the privilege claim expressly and describe the nature of the documents, communication or things not produced or disclosed in a manner that will enable the other parties to assess the applicability of the privilege or the protection. If a party fails to supply adequate information, then the trial court may find a waiver of attorney/client privilege adding that while waiver is within the court's discretion, a waiver finding is not favored.

Here, the Petitioner's counsel repeatedly e-mailed Respondent's counsel that he redacted attorney/client communications explaining that his clients had forwarded emails to him that were responsive to the discovery requests and apparently included discussion about those emails when they forwarded them. The Respondents moved to compel and requested a privilege log for any documents redacted on privilege grounds. After a hearing but without an *in camera* inspection of the emails, the trial court found that the lack of a privilege log constituted a waiver of the attorney/client privilege. The First District found this was an abuse of discretion and a departure from the essential requirements of law and issued a writ of certiorari.

Proposal for settlement

American Integrity Insurance Company of Florida v. Branford, 312 So. 3d 91 (Fla. 4th DCA 2021)

The Fourth District held that the trial court erred in finding the Defendant's Proposal for Settlement and Release has ambiguous and unenforceable because of the use of the word "assigns" within the standard release, stating that the release was on behalf of the Plaintiff on her own behalf "and on behalf of her agents, heirs, spouses, successors, assigns…". As such, they ordered that the Defendant's Motion for Attorney's Fees be granted and that the trial court should set an evidentiary hearing to determine the amount of the attorney's fees.

Ketterling v. Morris, 312 So. 3d 555 (Fla. 1st DCA 2021)

Morris was a passenger in a vehicle that collided with another vehicle driven by Parker Ketterling and owned by Karen Ketterling. The Ketterlings served a Joint Proposal for Settlement to Ms. Morris for $20,000 to settle all claims arising out of the motor vehicle accident. On the same day the Ketterlings served the offer on Ms. Morris, she served an offer on each of the Ketterlings individually. Shortly before the offers were set to expire, Karen Ketterling filed a notice of accepting Ms. Morris' offer to settle all of Ms. Morris' claims against her. A day later, Ms. Morris filed a notice of accepting the offer the Ketterlings made to her. The Ketterling's objected to Ms. Morris' acceptance.

At the hearing on the objection, Ms. Morris argued that because the Ketterlings did not withdraw the offer, it remained open. Morris also argued that because the Ketterlings did not differentiate the amounts owed by each defendant towards the damages owed to Ms. Morris, Ms. Morris could assign Parker Ketterling

the entire amount offered. The trial court agreed, granted Ms. Morris' Motion to Enforce Settlement, and entered a final judgment in favor of Ms. Morris.

The First District ruled that because Karen Ketterling accepted Ms. Morris' offer prior to Morris accepting the Ketterlings joint offer, Ms. Morris would not have been able to fulfill her obligation under the Ketterlings offer. Because Ms. Morris could not fulfill all of her obligations, the Ketterlings offer was no longer valid and thus, the Court vacated the final judgment and order granting Ms. Morris' Motion to Enforce Settlement Agreement.

Arizone v. Homeowners Choice Property and Casualty Insurance Company, Inc., 313 So. 3d 913 (Fla. 2d DCA 2021)

The Defendant served a Proposal for Settlement on a second Plaintiff 11 days after she was added to the case through the filing of an Amended Complaint. The Second District held that this was in violation of Rule §1.442(b) of the Florida Rules of Civil Procedure finding that the proposal was premature and therefore was unenforceable. In doing so, they noted that the critical date for determining whether the Proposal for Settlement served on the second Plaintiff was timely was the date that the second Plaintiff commenced the action, which is the date on which she became a Plaintiff.

Central Florida Medical & Chiropractic Center v. Progressive American Insurance Company, 328 So. 3d 1111 (Fla. 5th DCA 2021)

Central Florida Medical (CFM) filed a Complaint against Progressive in County Court alleging that Progressive refused to pay CFM for medical services rendered to its insured following a motor vehicle accident. Progressive took the position that the insured failed to comply with Florida Statute §627.736(1)(a) which requires medical treatment be sought within 14 days of a motor vehicle accident. Progressive moved for Summary Judgment and approximately one month later sent CFM a Proposal for Settlement incorporating all provisions set forth under Florida Rule of Civil Procedure 1.442 and Florida Statute §768.79. CFM moved to strike the Proposal asserting that the case was filed pursuant to the Florida Small Claims Rules and that Rule 1.442 was not invoked pursuant to Small Claims Rule 7.020(c). The trial court ultimately granted Progressive's Motion for Summary Judgment. The trial court then awarded Progressive its fees and costs pursuant to the Proposal for Settlement. The Fifth District affirmed finding that Progressive was not required to specifically invoke Rule of Civil Procedure 1.442 in order for its Proposal for Settlement to be enforceable. The Rule unambiguously states that it applies to all

Proposals for Settlement authorized by Florida law and the law is clear that Proposals for Settlement are authorized in PIP cases filed in small claims court.

CCM Condominium Association, Inc. v. Petri Positive Pest Control, Inc., 330 So. 3d 1 (Fla. 2021)

When determining entitlement to attorney's fees, pursuant to Florida Statute §768.79 post-offer prejudgment interest is excluded from the "judgment obtained."

Ehlert v. Castro, 330 So. 3d 41 (Fla. 4th DCA 2021)

The Plaintiff prevailed in a personal injury case and then sought attorney's fees based upon her Proposal for Settlement. The Defendants argued that a paragraph in the Proposal for Settlement was ambiguous. Specifically, the Defendants contended that the proposal required them to release any unknown future claims and pointed out that the Plaintiff was a tenant of the Defendants at the time and that Defendants could have had a future cause of action against the Plaintiff for unpaid rent and the broad paragraph in the proposal would have taken care of that claim as well.

The Fourth District reversed and reminded us that Florida law does not require the elimination of every ambiguity in assessing a Proposal for Settlement. The court observed that the Proposal for Settlement stated with particularity the claims to be settled including a paragraph which stated it was going to resolve all claims plead by the Plaintiff against the Defendant as a result of the subject accident; clearly referring to the premises liability claim for injuries involved in the case.

Inspired Products Group, LLC v. Inspired Development Group, LLC, 330 So. 3d 947 (Fla. 4th DCA 2021)

The Defendant moved for Summary Judgment in this matter. Prior to the hearing on the motion, the Defendant served a Proposal for Settlement to resolve all claims for damages that could be awarded to the Plaintiff in a final judgment. The trial court granted Summary Judgment on four of the five counts of the Complaint, leaving one count remaining. The Plaintiffs 30-day window for accepting the Proposal for Settlement expired on the same day in which the trial court issued the Summary Judgment ruling. The Plaintiff did not accept the Proposal and instead,

shortly after the court's Summary Judgment ruling voluntarily dismissed the sole remaining count without prejudice.

Following the voluntary dismissal, of the final remaining count and the subsequent entry of Final Judgment in its favor, the Defendant moved for attorney's fees and costs. The Plaintiff argued that because the trial court granted Summary Judgment on four of the five counts, this terminated their ability to accept the Proposal for Settlement. The Defendant argued that because the court's Summary Judgment did not dispose of all of the Plaintiff's cause of actions, it was not a Final Judgment and therefore the Plaintiff could have accepted the Proposal for Settlement even after service of the Summary Judgment. The trial court ruled in favor of the Plaintiff and the Fourth District reversed ruling that the Plaintiff could have accepted the Proposal for Settlement instead of voluntarily dismissing the remaining count.

Safepoint Insurance Company v. Williams, 46 FLWD 2406 (Fla. 3d DCA 11/10/21)

Safepoint served a Proposal for Settlement on Williams for a property damage claim. The proposal offered $25,000 to settle the claim, including all litigation costs and pre-judgment interest and also stipulated to Williams' entitlement to attorney's fees without enumerating them. When the verdict did not exceed the proposal which Plaintiff rejected, the court found that it was valid and the Third District affirmed finding that neither Florida Statute §768.79, Florida Rule of Civil Procedure 1.442 or case law interpreting them specifically required that the amount of attorney's fees and costs be quantified in order to create a valid order. It should be noted that no Florida court has held that the Plaintiff's reasonable pre-offer attorney's fees must be quantified and included in the total amount of the proposal in order to create a valid Proposal for Settlement.

Jain v. Buchanan Ingersoll, 46 FLWD 2575 (Fla. 3d DCA 12/1/21)

The Plaintiff sued his attorney and the attorney's law firm for legal malpractice. The attorney served an Offer of Judgment. The firm did not join in it. Upon winning the case, the attorney then moved for reimbursement of his attorney's fees. The losing Plaintiff asserted that the attorney was not entitled to collect the fees because he had not actually incurred any, because the firm was contractually obligated to indemnify him and did indemnify him.

The trial court determined that the attorney was entitled to his fees because Florida Statute §768.79 permits recovery of fees "incurred on the Defendant's behalf." Thus the analysis was unaffected by the fact that the Defendant lawyer may not himself had been contractually obligated to pay fees, because his firm was. The trial court also found that apportionment was not appropriate because the fees incurred by both the attorney and the firm are the same.

The Third District affirmed the trial court's rulings noting that the fact that another party or a non-party may have paid the offeror's attorney's fees is of no consequence as to whether the offeror is entitled to those fees pursuant to an Offer of Judgment. Because the attorney's fees and costs were incurred on the Defendant's behalf, the trial court properly found entitlement.

Superior Auto Glass of Tampa Bay, Inc. v. Government Employees Insurance Company, 46 FLWD 2601 (Fla. 2d DCA 12/8/21)

The trial court order granted GEICO's appellate attorney's fees but stated that it was conditioned upon it prevailing in the underlying proceeding; however, GEICO's entitlement to attorney's fees was based upon the offer of settlement statute. The Second District quashed the trial court's order and granted certiorari pointing out that the offer of settlement statute requires a party seeking an award of attorney's fees to satisfy a number of requirements independent of prevailing at trial. As such, it was a departure from the essential requirements of the law to condition the awarded fees on prevailing at trial, instead of GEICO satisfying all the requirements of the offer of settlement statute.

Punitive damages

R.J. Reynolds Tobacco Company v. Coates, 308 So. 3d 1068 (Fla. 5th DCA 2021)

The jury awarded $150,000 to the Plaintiff in compensatory damages and $16,000,000 in punitive damages. The Fifth District stated that a $16,000,000 punitive damage award in a tobacco case involving death did not, on its face, reflect either prejudice or passion and was well within the range of punitive damages awarded in other tobacco cases. As such, the statutory presumption of excessiveness that attaches to a punitive damage award that exceeds a 3:1 ratio was overcome by clear and convincing evidence where the Plaintiff had presented evidence of the Defendant's history of disregard for the health of its smokers; its purposeful concealment of the negative health risks of smoking; its manipulation of additives

and tobacco to ensure addiction; and its efforts to mislead the public on the dangers of smoking, all while knowing of the negative impact that the smoking had on the customer's health.

That said, although the evidence supported an award in excess of the 3:1 ratio, a punitive damage award of almost 107 times the compensatory award was excessive and unsustainable. The court also held that the punitive damage award was unconstitutionally excessive under Federal Due Process guarantees. As such, the district court ordered that the matter be remanded to the trial court for remittitur, or, if remittitur was rejected by either party, a new trial solely on the amount of punitive damages. They also certified the following question as to the Florida Supreme Court as one of great public importance:

> WHEN OTHER FACTORS SUPPORT THE AMOUNT OF PUNITIVE DAMAGES AWARDED, BUT THE AWARD IS EXCESSIVE, COMPARED TO THE COMPENSATORY AWARD, DOES THE AMOUNT OF PUNITIVE DAMAGES THAT MAY LEGALLY BE IMPOSED FOR CAUSING THE DEATH OF A HUMAN BEING DEPEND ON THE ACTUAL AMOUT OF COMPENSATORY DAMAGES AWARDED TO THE DEDEDENT'S ESTATE, EVEN WHEN THAT COMPENATORY AWARD IS MODEST AND THE PUNITIVE AWARD WOULD BE SUSTAINABLE COMPARED TO AWARDS IN OTHER CASES FOR COMPARABLE INJURIES CAUSED BY COMPARABLE MISCONDUCT?

Deaterly v. Jacobson, 313 So. 3d 798 (Fla. 2d DCA 2021)

The prior trial judge denied the Motion for Leave to Add Punitive Damage Claim, finding that the Plaintiff had failed to establish a reasonable factual basis that the Defendant was personally guilty of intentional misconduct or gross negligence, "based on clear and convincing evidence." Subsequent thereto, a successor trial judge took over the case and determined that the first judge applied the incorrect standard to Plaintiff's Motion for Leave to Amend and, therefore, modified the prior order and granted the Plaintiff's motion. Specifically, the Plaintiff only had to make a reasonable showing by evidence that there was a reasonable basis for recovery of such damages. The Second District upheld the ruling of the successor judge.
White v. Boire, 320 So. 3d 814 (Fla. 2d DCA 2021)

The trial court granted Plaintiff's Motion for Leave to Amend their Complaint to seek punitive damages; however, the Second District quashed this order because the trial court applied the incorrect legal standard in granting the motion. Although the trial court's written order suggested that the trial court applied the correct evidentiary standard in granting the motion, the trial court's statements at the hearing concerning the sufficiency of the "allegations" suggested otherwise, particularly given that the Plaintiff's proffer consisted solely of their counsel's representations notwithstanding the Defendants' repeated unaddressed objection to same.

The Bentley Condominium Association, Inc. v. Bennett, 321 So. 3d 315 (Fla. 3d DCA 2021)

The Third District granted certiorari and found that the trial court departed from the essential requirements of law in granting the Plaintiff's Motion to Amend to add a claim for punitive damages because the Plaintiff filed evidence in support of her motion within 20 days of the hearing on the motion in violation of Florida Rule of Civil Procedure 1.190(f).

Sultan v. Walgreen Company, 324 So. 3d 563 (Fla. 3d DCA 2021)

A Summary Judgment was entered in favor of Walgreens, its registered manager, and its pharmacist on the issue of punitive damages. The Third District reversed and noted that "the pretrial discovery adduced in this case established, and a jury later found, the pharmacist embarked on an aggressive campaign to destroy [the Plaintiff's] reputation within the medical community, along the way inculpating him in various criminal acts. Further, submissions of records supported the conclusion that Walgreens was aware of this course of conduct, as numerous clients raised the alarm, yet it failed to take any meaningful action. Under these circumstances, the question of punitive damages presented a question for the jury."

Keen v. Jennings, 327 So. 3d 435 (Fla. 5th DCA 2021)

The trial court granted Plaintiff leave to amend to add a claim for punitive damages. The Fifth District quashed this order finding that the Plaintiff failed to plead a facially sufficient basis for a punitive damage claim. The Fifth District noted that although the general rule that such an order is not typically reviewable by certiorari does not apply here because a facially insufficient pleading for punitive

damages authorizes or allows intrusive financial discovery that would be otherwise impermissible.

Moss & Associates, LLC v. Lapin, 46 FLWD 2316 (Fla. 3d DCA 10/27/21)

Certiorari review is unavailable where the trial court complied with the procedural requirements of Florida Statute §768.72 and the trial court entered an order finding that the evidentiary proffer in support of the claim for punitive damages was sufficient to support the claim.

Kovacs v. Williams, 46 FLWD 2632 (Fla. 5th DCA 12/10/21)

The trial court granted Plaintiff's motion to amend allowing punitive damages without finding that the Plaintiff carried his burden under Florida Statutes §768.72(1). Specifically, the trial court did not state that the Plaintiff had made a reasonable showing by the evidence to provide a reasonable basis for recovering such damages. As such the Fifth District granted certiorari.

Recusal

Dabbs v. State of Florida, 330 So. 3d 50 (Fla. 4th DCA 2021)

During jury selection in a criminal case, the trial Judge in making a point about the Defendant being innocent until proven guilty asked the entire venire what the verdict would be if he sent them to deliberate before hearing any evidence. The juror in question, an engineer, loudly and quickly responded "not guilty" because criminal Defendants are presumed innocent. The State then exercised a strike against this juror and the Defendant objected because the juror was female and Hispanic. When asked for gender and race neutral reason for the strike, the State responded that the juror seemed exceptionally smart in terms of technical matters and that as a result she might be lured into looking too far into things. The prosecutor also noted that there had been no pattern of striking female or Hispanic jurors. Under these circumstances, the trial court allowed the strike.

In trying to determine whether the proffered explanation was genuine or was actually a concealed attempt to discriminate based upon race, the Fourth District looked at all of the relevant circumstances and applied the five non-exclusive factors (a failure to examine the juror or a perfunctory examination of the juror; a showing that the alleged group bias was not shown to be shared by the juror in question;

singling the juror out for special questioning thereby designed to invoke a certain response; whether the reason for the strike was unrelated to the facts of the case; and/or whether the challenge was based upon reasons equally applicable to a juror who was not challenged). The Fourth District found that the trial court properly followed the procedure set forth in the *Melbourne* decision and that the Defendant failed to rebut the presumption that the State's peremptory strike was genuine and did not show that the trial court's ruling was clearly erroneous.

The Fourth District also upheld the trial court's refusal to grant the Defendant's Motion to Disqualify. Personal bias as the Fourth District stated, must come from an extra-judicial source such as bias directed at a Defendant simply because of the category of their case. In this case, the trial Judge expressed the belief that the Appellate Court's prior rulings overturning a conviction were erroneous. The Fourth District noted that it may have been better for the trial Judge to refrain from saying those things; however, the remarks themselves were only evidence of judicial bias and not reasonably sufficient to create a well-grounded fear in the Defendant that he would not receive a fair trial.

Sanctions

Tribble v. L.O.B., 315 So. 3d 1239 (Fla. 2d DCA 2021)

The trial court entered sanctions against Tribble but the Second District found that the trial court erred by failing to include specific findings regarding the number of hours reasonably expended and the reasonableness of the hourly rate. Further, the trial court erred by including an award of expert witness fees because these are taxed as costs and the plain language of the statute on sanctions dictates that the sanctions permitted did not include costs.

Alvarez v. Citizens Property Insurance Corp., 325 So. 3d 231 (Fla. 3d DCA 2021)

After sustaining water-related damage to the interior of her residence, Alvarez filed suit against Citizens seeking to recover proceeds under a homeowner's policy. Citizens denied coverage and asserted that Gonzalez and Abreu were co-owners of the insured property. As a result, it sought a court order requiring their joinder as co-insureds and indispensable parties. The trial court ordered Alvarez to add both as party Plaintiffs. Alvarez complied and the parties then embarked upon discovery. Abreu failed to appear for one duly noticed deposition and Gonzalez failed to appear for two duly noticed depositions. Eventually, both were deposed without the imposition of any sanctions. Following the depositions, the trial court issued a

mediation order. On the day of mediation, Abreu appeared with his attorney who also represented the other two homeowners. Alvarez was available telephonically pursuant to a stipulation; however, Gonzalez failed to appear because she was apparently in Cuba.

Citing non-compliance with the mediation order, Citizens aborted the mediation and, by way of a motion, sought terminating sanctions. In response, the homeowner's counsel filed an affidavit contending that Citizens "unilaterally refused to proceed with mediation, despite the fact" that she and Abreu "had full authority to negotiate and settle the subject lawsuit." The trial court convened a non-evidentiary hearing and reserved ruling on sanctions. Thereafter, without further hearing, a successor Judge struck the homeowner's pleadings and dismissed the case. The decision was premised upon a finding that the homeowner's willfully and contumaciously failed to appear for the mediation as evidenced by both their non-appearance and pattern of delays during the discovery process. The Third District reversed and found that dismissal was too severe a sanction where only one of the three owners of the property failed to appear for mediation. The insureds were, however, ordered to pay the mediator's fee and attorney's fees as a sanction.

Ofer v. Bernstein, 327 So. 3d 901 (Fla. 3d DCA 2021)

The Third District reversed and held that it was error for the trial court to dismiss a Complaint with prejudice as a sanction for attorney misconduct where the hearing was not noticed as an evidentiary hearing and the court did not address all of the *Kozel* factors.

Settlement agreement

Star Casualty Insurance Company v. Gables Insurance Recovery, 326 So. 3d 813 (Fla. 3d DCA 2021)

Portal was injured in an automobile accident and sought medical treatment from Finlay Diagnostic Center and Aesculapius Medical. Portal assigned his PIP benefits under his policy with Star Casualty to these providers, each of whom later assigned their rights to Gables Insurance Recovery, Inc. Subsequently, Gables Insurance filed two separate lawsuits against Star Casualty for breach of contract based upon improper calculation of fee structure rates. Star Casualty confessed judgment in the Aesculapius case and the parties later entered into a settlement agreement. Following this settlement, the litigation involving Finlay Diagnostic

continued for two years. Star Casualty then filed a Motion to Enforce the earlier settlement agreement asserting it had settled "all claims arising out of Portal's motor vehicle accident" including the claims raised in the Finlay Diagnostic litigation. Gables Insurance moved for sanctions and argued that the earlier settlement was solely for attorney's fees and costs related to the Aesculapius litigation and had nothing to do with the Finlay Diagnostic litigation.

The trial court conducted a non-evidentiary hearing at which time Star Casualty argued that the settlement agreement unambiguously encompassed both pending lawsuits and urged the trial court not to consider any parol evidence. Gables Insurance agreed that the court need not resort to parol evidence because there was no evidence of a "meeting of the minds" to settle the Finlay Diagnostic litigation. Alternatively, it argued that if the material terms of the agreement were ambiguous, the court could consider parol evidence in adjudicating the Motion to Enforce the settlement. Following argument by counsel, the trial court denied Star Casualty's Motion to Enforce the Settlement Agreement. Star Casualty then stipulated to a final judgment against it reserving its right to appeal the denial of its Motion to Enforce the Settlement.

On appeal, the Third District found that the language in the agreement contained a latent ambiguity such that it was necessary for the trial court to conduct an evidentiary hearing and consider parol evidence to determine the intent of the parties to the underlying settlement agreement.

Set-off

Irvin v. LJ's Package & Lounge, Inc., 321 So. 3d 300 (Fla. 2d DCA 2021)

Irvin was significantly injured in a car accident with a drunk driver. He sued the drunk driver, as well as the two bars that served the Defendant, despite knowing that the driver was habitually addicted to alcohol. Irvin resolved his claim with the first bar and, after that, he agreed to non-binding arbitration with the driver. The only issue for the arbitrator was the extent of the Plaintiff's damages which the arbitrator ultimately concluded were in excess of $11,000,000.00. The arbitration award noted that there were potentially other tortfeasors, but it did not address the fault of any others who could be culpable. The award also noted that it was not meant to be dispositive of other issues or evidence outside of the record.

After the 30 days for the Plaintiff to file a trial *de novo* had elapsed, the Defendant Driver moved for entry of final judgment. The Plaintiff then reached a confidential settlement with the second bar that had served the Defendant Driver.

The trial court required the disclosure of the amount of that settlement, as well as one that the Plaintiff had entered into at the first bar, and then the Defendant sought a set-off for both settlements. In opposing the set-offs, the Plaintiff cited Florida Statute §44.103(5) which provides that when an arbitration decision is final, if a request for trial *de novo* is not filed within the time provided by the rules, and without that, the presiding judge merely enters orders and judgments to carry out the terms of the decision. The Plaintiff asserted that the trial court had no authority to grant the set-offs after the time of the request for the trial *de novo* had passed, emphasizing the finality of the arbitrator's decision.

The Second District generally agreed, but explained that while the trial court lacked discretion to alter the decision of the arbitrator, the arbitrator's decision did not encompass – rather it expressly avoided passing upon – the liability of the released third parties, whose settlement payments the Defendant had a statutory right to set-off against the award, because it covered the same damages pursuant to §46.015(2) and §768.041(2) finding that the final judgment did enforce the arbitration award, and did not alter the findings of the arbitrator. The Court also found that the set-offs were consistent with the terms of the arbitration decision. The Plaintiff argued that he was improperly deprived of notice that the arbitration award could be reduced by a future settlement at the time he was required to make the decision about whether to request a trial. The Court rejected the due process argument, noting that the two separate statutes requiring trial courts to set-off the amount of the settlement paid by the released parties provided notice and the Plaintiff was aware of the second bar's potential liability at the time of the arbitration and deadline to reject the award. The Court then explained that neither the Plaintiff nor the Defendant driver was required to argue the liability of the two bars, because the arbitrator would have neither a reason nor a logical ability to balance the tortious culpability of the Defendant driver against that of the bars, because the bar's liability was derivative and completely overlapping of the damages caused by the Defendant driver. The Court also said that the Plaintiff was not deprived of an opportunity to litigate the set-off issue before the trial court after the arbitration award became final, admonishing that the trial court was statutorily prohibited from allowing the Plaintiff to recover twice for the injuries caused by the Defendant driver, and also that the enforcement of the statutory set-off after the deadline for the parties to request a trial *de novo* did not abrogate any of the requirements of the arbitration statute.

United Automobile Insurance Company v. Isot Medical Center Corp., 46 FLWD 2408 (Fla. 3d DCA 11/10/21)

Rodriguez was an insured of United Automobile and was injured in an accident. Thereafter, he sought treatment at Isot. Isot filed suit against United Automobile for breach of contract to recover benefits owed for medical services rendered. Summary Judgment was eventually entered in favor of Isot. The Third District affirmed and held that a claim for set-off in an insurance contract case must be raised by the insurance company as an affirmative defense. Because United Automobile did not assert the set-off as an affirmative defense and because no evidence regarding the disputed benefits was presented to the finder of fact, the trial court appropriately denied set-off.

Statute of limitations

Friedel v. Edwards, 327 So. 3d 1242 (Fla. 2d DCA 2021)

The Plaintiff filed a Complaint against a driver who hit her in an accident. The Complaint was filed more than three years after the accident happened. At the time that the Complaint was filed, the Plaintiff was unaware that the Defendant driver had actually passed away three months before the Complaint was filed. Upon learning of the driver's death, the Plaintiff moved to amend her Complaint seeking to add the Personal Representative who had been appointed for the Estate. By the time the amendment was made, four years had passed from the time of the accident. The trial court refused to allow the amendment ruling that the statute of limitations had passed. The Second District reversed and found that simply because the original Complaint was mistakenly filed against the deceased driver unknowingly, it did not render the Complaint a legal nullity as the Defendant had asserted. The District Court also held that the trial court erred in refusing to allow the Plaintiff to amend her Complaint because it related back to the original filing because it merely substituted the Personal Representative for the deceased driver.

Summary judgment

City of Naples v. Chops City Grill, Inc., 331 So. 3d 291 (Fla. 2d DCA 2021)

The Plaintiff was injured when she tripped and fell on a sidewalk in an area with pavers in front of the restaurant. The patron sued the city and later added the

restaurant as a Defendant. The restaurant's Summary Judgment was granted but the Second District reversed and found that the restaurant failed to meet its burden establishing the absence of negligence. More specifically, it failed to provide evidence that it did not have control over the pavers in front of the restaurant where the Plaintiff fell and thus had no duty of care concerning the area.

Trade secrets

Gulfcoast Spine Institute, LLC v. Walker, 313 So. 3d 854 (Fla. 2d DCA 2021)

It was alleged that Walker suffered injuries when Martinez's vehicle collided with her. After the accident, Walker sought treatment from BioSpine, amongst other providers. She signed an agreement under which the cost of her medical care was "her responsibility whether her insurance company pays or not." Here, her health insurer paid for some of her treatment but not for all of it.

Martinez eventually sought extensive discovery from parties and non-parties alike relevant to this case. He sought information from BioSpine including its methodology for determining its pricing; its methodology for using CPT codes; contracts it had reached with private insurers; its realization rates from different categories of patients; and its overhead cost for medical equipment, personnel, procedures and facilities.

Martinez also sought documentation for other patients who received the same procedures that Walker did. BioSpine moved for protective order arguing that many of the items sought were confidential and proprietary business information and that the Defendant was seeking trade secrets without satisfying the requirements under Florida law of establishing reasonable necessity.

The trial court eventually granted Martinez's discovery and the Second District quashed this order and granted certiorari finding that the trial court departed from the essential requirements of the law by compelling a non-party medical provider to disclose undisputed trade secrets without conducting the relevant balancing test whereby making findings or implementing protective measures as required by law.

Venue

Miracle Chiropractic & Rehab Center v. 21st Century Centennial Insurance Company, 316 So. 3d 376 (Fla. 4th DCA 2021)

The trial court erred in granting the insurance company's Motion to Transfer Venue where the motion was neither verified nor supported by an Affidavit.

Waiver of privilege

Onward Living Recovery Community v. Mormeneo, 319 So. 3d 115 (Fla. 3d DCA 2021)

The Third District granted certiorari and found that the trial court departed from the essential requirements of the law by requiring the Defendant to produce root cause analysis and incident reports after finding that these reports were prepared in the ordinary course of business and constituted non-privileged, discoverable business records or, alternatively, that any work product privilege was waived because the corporate representative used the reports at her deposition. The Third District pointed out that the fact that the Defendant required that records be created after a "sentinel event" supports the contention that the documents were created in anticipation of litigation.

Further, with respect to the conclusion that any privilege was waived by the corporate representative's reference to these documents during her deposition, on remand the trial court was to conduct an *in-camera* inspection to determine whether the references to the documents were such that the privilege was waived and if so, to determine with specificity the extent of the waiver. Further, to the extent that the trial court on remand determines that some or all of the records are protected from discovery, an evidentiary hearing will be required to determine whether the reports contained information that was unobtainable elsewhere without undue hardship.

Waiver of right to arbitration

Mirro v. Freedom Boat Club, LLC, 328 So. 3d 1108 (Fla. 2d DCA 2021)

Mirro filed a Complaint against Freedom and others seeking damages for personal injuries sustained in an accident on Freedom's boat which she had rented as part of her boating club membership. Freedom moved to dismiss the Complaint or compel arbitration under the arbitration provision in the boating club membership

agreement. Mirro filed a response arguing that Freedom had waived its right to arbitrate by previously filing and participating in a limitation of liability action regarding arbitrable issues in Federal Court without invoking its right to arbitration. In fact, Freedom had filed a Complaint for Exoneration from or limitation of liability under the limitation of Ship Owners' Liability Act. The Complaint addressed Mirro's claim that she sustained personal injuries on the boat and requested that the court find that Freedom was not liable to any extent whatsoever arising from the incident. In the alternative, they requested that any liability be limited to the value of its interest in the vessel. The trial court compelled arbitration and the Second District reversed finding that Freedom waived its right to arbitration under the totality of the circumstances.

Work product privilege

Avatar Property & Casualty Insurance Company v. Mitchell, 314 So. 3d 640 (Fla. 3d DCA 2021)

After sustaining damage to her residence, Mitchell contacted Avatar to report a claim. A field inspection was arranged, and Avatar's adjuster responded to her home. The adjuster met with the loss consultant, retained by Mitchell. Thereafter, the adjuster prepared a post-loss report and photographed the interior and exterior of the residence, reporting his observations on each of the photographs. A dispute regarding coverage arose and Mitchell filed suit. Thereafter, she sought discovery of any and all photographs taken by Avatar of the property and all documents containing information regarding a statement by Mitchell of any time during Avatar's handling of Mitchell's loss, including adjuster notes, claims reports, interoffice memorandum, tape recordings and any transcripts or written statements from Mitchell. Avatar claimed work-product privilege and filed a privilege log. Following an *in camera* review, the trial court ordered production of both the report and unredacted photographs.

A Petition for Writ of Certiorari was filed. The Third District concluded that the materials ordered to be produced constituted work-product. The Plaintiff made no showing below of the exceptional circumstances required to justify disclosure of work product and, as a result, the Third District granted certiorari.

IMC Hospitality, LLC v. Ledford, 46 FLWD 2460 (Fla. 3d DCA 11/17/21)

The Plaintiff slipped inside a restaurant. During litigation, the Plaintiff sought the production of the in-house incident report, along with photographs of the accident scene. The Defendant objected because the incident report and photographs were prepared in anticipation of litigation and thus were allegedly protected by the work-product privilege. The parties presented competing Affidavits where the Plaintiff and the restaurant's assistant manager both attested that they had offered the incident report in question. The trial court held an evidentiary hearing and conducted an in-camera inspection ultimately ordering the production of the incident report and the photographs. As to the incident report, the trial court found the Plaintiff more credible and also found that the Plaintiff had met the requirements of Florida Rule of Civil Procedure 1.280(b)(4) because the statement had been made by the Plaintiff himself. The Third District ruled, however, that the work-product privilege still protected production of the photographs that were taken and issued a writ of certiorari as to the production of those photographs.

Wrongful death

Hamblen v. Pilot Travel Centers, 312 So. 3d 218 (Fla. 1st DCA 2021)

Samantha Hamblen died in a car crash on a highway next to a travel center owner by Pilot. Her estate sued the Defendant under the wrongful death act and awarded Stephen Hamblen, the only statutory survivor $200,000 per year for 25 years for his mental pain and suffering. The $5,000,000 verdict was then reduced by the comparative negligence of non-parties. Pilot Travel timely moved for a new trial and while the motion was pending, Stephen Hamblen died. The trial court later denied the Defendant's Motion for a New Trial. The Defendant then moved for relief from judgment arguing the award to Stephen Hamblen for mental pain and suffering should be reduced to zero dollars.

Florida Statute §768.24 states that "a survivor's death before final judgment shall limit the survivor's recovery to lost support and services to the date of his or her death." Because there was no claim for lost support and services, the Defendant argued the recovery for pain and suffering should be vacated. The dispute in this case turns on when the final judgement occurred. The Defendant argued that because its Motion for New Trial was pending when Stephen Hamblen died, the judgement was not yet final.

The estate argued that the trial court should interpret the final judgment in the context of abatement law and conclude that it occurred before his death. The trial court found the Defendant's argument more persuasive and reduced the judgment. The First District affirmed the trial court pointing to its precedent which states that a final judgment does not occur until a Motion for Rehearing has been disposed of under Rule 1.540(b). They then held that the same is true of motions for new trial.