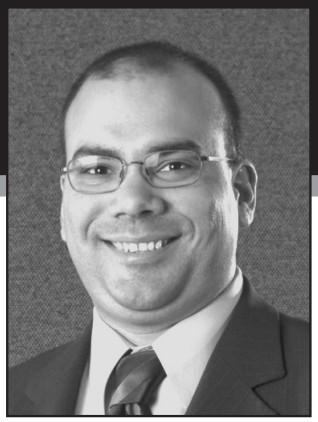
Recent Legal Developments

By Ezequiel Lugo



FLORIDA SUPREME COURT DECISIONS

1. Is discrimination on the basis of pregnancy prohibited by the Florida Civil Rights Act of 1992?

The Florida Supreme Court in *Delva v. Continental Group, Inc.*, 137 So. 3d 371 (Fla. 2014), held that pregnancy is a primary characteristic of the female sex and a natural condition unique to women. Discrimination based on pregnancy is therefore unlawful discrimination because of sex prohibited by the Florida Civil Rights Act of 1992.

2. Must a motion for appellate attorney's fees be filed no later than the time for service of the reply in an original proceeding?

In *Advanced Chiropractic & Rehabilitation Center, Corp. v. United Automobile Insurance Co.*, 140 So. 3d 529 (Fla. 2014), the Florida Supreme Court found that the appellate rule requiring that a motion for attorney's fees be filed no later than the time for service of the reply brief did not apply in original writ proceedings. Additionally, the court rejected the district court's holding that a request for attorney's fees in original proceedings must be made in the petition, the response, or the reply. Instead, the court held that a motion for appellate attorney's fees in an original proceeding simply must be timely to provide the relief sought. Accordingly, the court ruled that a motion for attorney's fees filed six days after the district court granted a petition for writ of certiorari was timely.

3. Can a physician defeat a medical malpractice claim by presenting testimony from a subsequent treating physician that adequate care by the physician would not have altered the subsequent care?

Florida's Supreme Court in *Saunders v. Dickens*, 151 So. 3d 434 (Fla. 2014), held that an initial treating physician may not insulate herself or himself from liability by introducing evidence that a subsequent treating physician would not have altered the subsequent care if the initial treating physician had provided adequate care. The court concluded that such evidence is irrelevant and inadmissible. The jury must determine whether each treating physician acted in a reasonably prudent manner.

4. Does the election of non-stacking uninsured/underinsured motorist (UM) benefits by the purchaser of the policy apply to all insureds under the policy?

The Supreme Court in *Travelers Commercial Insurance Co. v. Harrington*, 39 Fla. L. Weekly S647 (Fla. Oct. 23, 2014), concluded that the coverage election made by the named insured to a UM insurance policy is binding on behalf of all insureds under the policy. Additionally, the court concluded that the family vehicle exclusion for UM coverage does not conflict with section 627.727(3), Florida Statues, which provides that underinsured vehicles shall be considered uninsured for purposes of UM coverage.

FIRST DISTRICT DECISIONS

5. Is an unambiguous proposal for settlement that fails to specify an amount for settling a pending punitive damages claim enforceable?

The First District in *R.J. Reynolds Tobacco v. Ward*, 141 So. 3d 236 (Fla. 1st DCA 2014), found that the trial court erred when it awarded attorney's fees based on an unambiguous proposal for settlement that would have extinguished pending claims for punitive damages, but did not state an amount for settling punitive damages claims. The court noted that section 768.79(2)(c), Florida Statutes, and Florida Rule of Civil Procedure 1.442(c)(2)(E) required the offeror to state with particularity the amount proposed to settle any pending claim for punitive damages.

ABOUT THE AUTHOR

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6. May a defendant obtain billing and collection documents from a non-party medical provider to determine the reasonableness of the charges for medical services provided to the plaintiffs?

The district court in *Laser Spine Institute, LLC v. Greer*, 144 So. 3d 633 (Fla. 1st DCA 2014), found that the trial court departed from the essential requirements of law in compelling a non-party medical provider to produce billing and collection documents that contain trade secrets subject to a confidentiality agreement. The trial court had not made any findings to support the conclusion that the defendant had demonstrated a reasonable necessity for the documents that outweighed the non-party medical provider's interest in maintaining the confidentiality of its trade secrets.

7. Does a plaintiff establish constructive knowledge under section 768.0755, the slip and fall statute, where drops of water were on the floor less than four minutes before the fall?

In *Walker v. Winn-Dixie Stores, Inc.*, 39 Fla. L. Weekly D1750 (Fla. 1st DCA Aug. 20, 2014), the First District affirmed summary judgment for a business establishment where the plaintiff fell because of unnoticeable drops of water on the floor. The defendant's employees had inspected the area about three minutes before the incident, and it had only started raining about one minute before the plaintiff fell. The appellate court held that the plaintiff had failed to overcome the statutory burden of proving that the business establishment had constructive knowledge of a "transitory foreign substance" requiring remedial action.

8. Under what circumstances does the absolute litigation privilege preclude a defamation lawsuit?

The First District in *James v. Leigh*, 145 So. 3d 1006 (Fla. 1st DCA 2014), found that the trial court departed from the essential requirements of law in denying a motion to dismiss claims for defamation as barred under the absolute litigation privilege. The petitioner's former law partner and law firm filed a complaint against the petitioner for defamation based on statements published by the petitioner in his divorce proceeding. The absolute litigation privilege applied to the defamation claim because the allegedly defamatory statements by the defendant had some relation to the subject of the underlying lawsuit. The maliciousness or falsity of the statements was irrelevant to the application of the privilege.

SECOND DISTRICT DECISIONS

9. Does the statutory cap on damages against an owner who "loans" a motor vehicle apply when the owner consigns a vehicle for sale? Can settlement amounts from other defendants be set off against an award for noneconomic damages?

The Second District in *Youngblood v. Villanueva*, 141 So. 3d 600 (Fla. 2d DCA 2014), held that section 324.021(9)(b)(3), Florida Statutes, the statutory cap on damages against an owner who "loans" a motor vehicle, does not apply where the tortfeasor's possession of the vehicle emanates from a commercial consignment. Additionally, the district court held that the trial court erred when it set off settlement amounts from other defendants against the award of noneconomic damages.

10. Are a plaintiff's personal injury damages limited to the insurance policy limits if the tortfeasor files for bankruptcy and the plaintiff has not established a bad faith action before the tortfeasor is discharged in bankruptcy?

In *Whritenour v. Thompson*, 145 So. 3d 870 (Fla. 2d DCA 2014), the Second District stated that a personal injury plaintiff has a right to have a jury decide and liquidate the damages. The personal injury plaintiff's negligence action and any potential subsequent bad faith action are two separate and distinct causes of action. The plaintiff must first obtain a judgment in a negligence action that determines liability and the amount of resulting damages before any potential bad faith action may arise. A tortfeasor's bankruptcy filing and discharge does not change this procedure, except that the bankruptcy trustee brings the bad faith action against the insurance company. The Second District held that a defendant's discharge in bankruptcy is not a legal basis to compel a plaintiff to accept the liability insurance limits in a negligence case.

11. May an insurer waive a two-year limitation period for completing repairs or replacing property under an Ordinance or Law Coverage endorsement?

The district court in *Axis Surplus Insurance Co. v. Caribbean Beach Club Association, Inc.*, 39 Fla. L. Weekly D1350 (Fla. 2d DCA June 27, 2014), held that the trial court correctly granted the policyholder's motion for summary judgment in a suit against its insurer to recover the increased cost of construction under an Ordinance or Law Coverage endorsement. The insurer relied on a two-year limitation clause to deny payment for the increased cost of construction because the policyholder had not completed the repairs within two years. The Second District held that the two-year limitation period was a forfeiture provision, and that the insurer had waived compliance through its silence and continued adjustment of the claim after the two-year period had expired.

12. Does a nonresident defendant waive his or her right to object to personal jurisdiction by failing to raise the issue until after the trial court enters a default judgment against him or her?

In *Wiggins v. Tigrent, Inc.*, 147 So. 3d 76 (Fla. 2d DCA 2014), the Second District stated that a judgment entered against a defendant over whom the court lacks personal jurisdiction is a void judgment that may be challenged at any time. Accordingly, a nonresident defendant does not waive his or her right to object to personal jurisdiction by failing to raise the issue until after the trial court has

entered a default judgment against the nonresident defendant. The trial court erred in failing to vacate the judgment against the nonresident defendant and to dismiss the action as to that defendant.

13. May a policyholder file a breach of contract suit after an insurer denies coverage as allowed by the sinkhole statutes? Does an insurer have to pay for subsurface repairs and associated interest before an insured enters into a contract for such repairs?

The district court in *Tower Hill Select Insurance Co. v. McKee*, 151 So. 3d 2 (Fla. 2d DCA 2014), stated that the policyholder did not preemptively file a breach of contract suit in a case where the insurer had denied a sinkhole claim based on an engineer's report finding no evidence of sinkhole. The policyholder obtained a competing report stating that the damage was caused by sinkhole. The policyholder had disclosed the competing report to the insurer prior to filing suit, but the insurer did not respond. Additionally, the trial court erred by ordering the insurer to pay damages for subsurface repairs and prejudgment interest on those damages because the policyholder had not entered into a contract for subsurface repairs.

THIRD DISTRICT DECISIONS

14. Does section 627.428 apply to cases involving insurance policies issued and delivered in another state?

In *Lopez v. State Farm Mutual Automobile*, 139 So. 3d 402 (Fla. 3d DCA 2014), the Third District held that a policyholder is not entitled to attorney's fees pursuant to section 627.428, Florida Statutes, under an insurance policy issued and delivered in Texas. But the district court found that the trial court was required to consider the application of Texas law to determine the policyholder's entitlement to attorney's fees.

15. Is a person who mistakenly reports a possible crime liable for negligence if the individual reported was actually innocent and physically injured during the ensuing interaction with police?

The Third District in *Bank of America Corp. v. Valladares*, 141 So. 3d 714 (Fla. 3d DCA 2014), reversed a final judgment entered after a jury verdict against a bank that mistakenly reported a customer to be a bank robber. The court held that a person who reports a suspected crime to the police cannot be liable unless he or she acted maliciously. The Third District disagreed with the case of *Harris v. Lewis State Bank*, 482 So. 2d 1378 (Fla. 1st DCA 1986), to the extent it held that a person can be liable for a good-faith, but negligent, mistake in summoning the police.

16. Is a party entitled to attorney's fees based on a proposal for settlement served more than 90 days after an action has commenced but less than 90 days after the party is added to the action?

The district court in *Design Home Remodeling Corp. v. Santana*, 146 So. 3d 129 (Fla. 3d DCA 2014), concluded that the trial court correctly refused to enforce a proposal for settlement made less than 90 days after the action was commenced against the party making the proposal. About a year after initiating the action, the plaintiffs filed an amended complaint adding a co-defendant. The co-defendant served a proposal for settlement sixty days after the plaintiffs had filed the amended complaint. The district court held that, pursuant to Florida Rule of Civil Procedure 1.442, the proposal was premature because it was made earlier than 90 days after the action had commenced against the co-defendant. The district court also clarified that two prior decisions reaching a contrary result, *Kuvin v. Keller Ladders, Inc.*, 797 So. 2d 611 (Fla. 3d DCA 2001), and *Shoppes of Liberty City, LLC v. Sotolongo*, 932 So. 2d 468 (Fla. 3d DCA 2006), had been overruled *sub silentio* by the Florida Supreme Court.

FOURTH DISTRICT DECISIONS

17. Are a treating doctor's documents regarding patients previously represented by a plaintiff's attorney and referrals from a plaintiff's attorney discoverable?

In *Brown v. Mittelman*, 39 Fla. L. Weekly D1806 (Fla. 4th DCA Aug. 27, 2014), the Fourth District held that the financial relationship between a treating doctor and the plaintiff's attorneys creates the potential for bias, and discovery on that issue was allowed. The Fourth District also held that a doctor's referral arrangements with the plaintiff's attorney in other cases was a proper source for impeachment. The court clarified that the existence of a direct referral from an attorney to a treating doctor does not determine whether discovery of the relationship between the attorney and the doctor is allowed. Additionally, the district court held that more extensive financial discovery may be appropriate from both the doctor and the attorney where there is evidence of a referral relationship between a treating doctor and an attorney.

18. Does a jury's determination of damages in a UM case bind the insurer in a subsequent bad faith action?

The Fourth District in *GEICO General Insurance Co. v. Paton*, 150 So. 3d 804 (Fla. 4th DCA 2014), concluded that the jury's determination of damages in the trial for UM benefits was binding on the insurer in a bad faith trial. The district court held that a UM action fixes the amount of damages in the bad faith action. The Fourth District rejected the concurring opinion in *Geico General Insurance Co. v. Bottini*, 93 So. 3d 476 (Fla. 2d DCA 2012), which expressed concern about a district court's jurisdiction to review the propriety of an excess verdict. The Fourth District explained that a district court's jurisdiction to review a final judgment allowed review of an earlier order denying a motion for new trial that challenged the total amount of the jury's verdict in the UM trial. The district court also

posited that the amount of damages could be reviewed after the entry of a final judgment in the bad faith case.

19. Must an insurer's liability for breach of contract be determined before an action for bad faith becomes ripe?

The Fourth District in *Cammarata v. State Farm Florida Insurance Co.*, 39 Fla. L. Weekly D1880 (Fla. 4th DCA Sep. 3, 2014) (en banc), reversed a summary judgment in favor of the insurer where the trial court ruled that the bad faith action was not ripe before the insurer's liability for breach of contract had been determined. The insurer had paid the policyholders based on an appraisal award, but there had been no determination that the insurer had breached the insurance contract. The *Cammarata* court held that a bad faith action ripens once an insurer's liability for coverage and the extent of damages has been determined, so an appraisal award satisfies the prerequisites to filing a statutory bad faith action. Additionally, the district court receded from its prior opinion in *Lime Bay Condominium Inc. v. State Farm Florida Insurance Co.*, 94 So. 3d 698 (Fla. 4th DCA 2012).

20. Should non-compliance with the e-mail service requirements bar an award of attorney's fees?

The district court in *Matte v. Caplan*, 140 So. 3d 686 (Fla. 4th DCA 2014), affirmed the trial court's denial of a motion for attorney fees under section 57.105 that had not been served in accordance with the requirements for e-mail service. The party seeking fees had attached the motion in the wrong format, failed to include the required information in the e-mail's subject line, and failed to include the required information in the body of the email. The Fourth District held that strict compliance with the e-mail service requirements of Florida Rule of Judicial Administration 2.516 was required before a court could assess attorney's fees under section 57.105.

FIFTH DISTRICT DECISIONS

21. Can a surviving spouse's loss-of-consortium claim survive the death of the deceased spouse?

In *Randall v. Walt Disney World Co.*, 140 So. 3d 1118 (Fla. 5th DCA 2014), the Fifth District held that a cause of action for loss of consortium survives the death of the injured spouse. The district court certified conflict with *ACandS, Inc. v. Redd*, 703 So. 2d 492 (Fla. 3d DCA 1997).

22. Does an insurer's post-suit payment of insurance benefits entitle a policyholder to attorney's fees under section 627.428 regardless of whether the insurer wrongfully caused the policyholder to file suit?

The Fifth District in *Omega Insurance Co. v. Johnson*, 39 Fla. L. Weekly D1911 (Fla. 5th DCA Sep. 5, 2014), concluded that the trial court erred in granting attorney's fees for the policyholder where the insurer had not wrongfully or unreasonably forced the policyholder to file suit. The district court reasoned that application of the confession of judgment doctrine turns on the policy underlying section 627.428, which is to penalize insurers for wrongfully causing policyholders to resort to litigation. The district court noted that the insurer had not wrongfully caused the policyholder to file suit because the insurer had complied with the statutory sinkhole investigation procedures.

23. Are attorney-client privileged communications between an insured and counsel retained by an insurer to represent the insured discoverable in a third-party bad faith action?

The district court, sitting en banc in *Boozer v. Stalley*, 146 So. 3d 139 (Fla. 5th DCA 2014), found that the trial court departed from the essential requirements of law in compelling an attorney retained by an insurer to represent an insured to submit to a deposition and produce documents without adequate consideration of the insured's attorney-client privilege. The district court held that the fact that an injured claimant may stand in the insured's shoes in a third-party bad faith action, or may have an independent right to bring a bad faith action, does not mean that the insured waived his or her attorney-client privilege. The district court receded from *Dunn v. National Security Fire & Casualty Co.*, 631 So. 2d 1103 (Fla. 5th DCA 1993). Additionally, the district court certified the question of whether *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005), and *Genovese v. Provident Life & Accident Insurance Co.*, 74 So. 3d 1064 (Fla. 2011), shield attorney-client privileged communications from discovery in a third-party bad faith case.

24. Does an insurer's file for an initial claim lose its qualified work product privilege when the claim is closed without litigation?

In *State Farm Florida Insurance Co. v. Marascuillo*, 39 Fla. L. Weekly D1401 (Fla. 5th DCA July 3, 2014), the Fifth District found that the work product doctrine protects documents created in anticipation of terminated litigation as well as anticipated litigation that never materializes. The court noted that Florida allowed discovery of work product materials in a bad faith action, but this case was a subsequent coverage action. Additionally, the Fifth District held that the trial court had departed from the essential requirements of the law by ordering production of the entire claim file for the initial claim without conducting an *in camera* inspection to determine whether any exception to the work product doctrine applied.