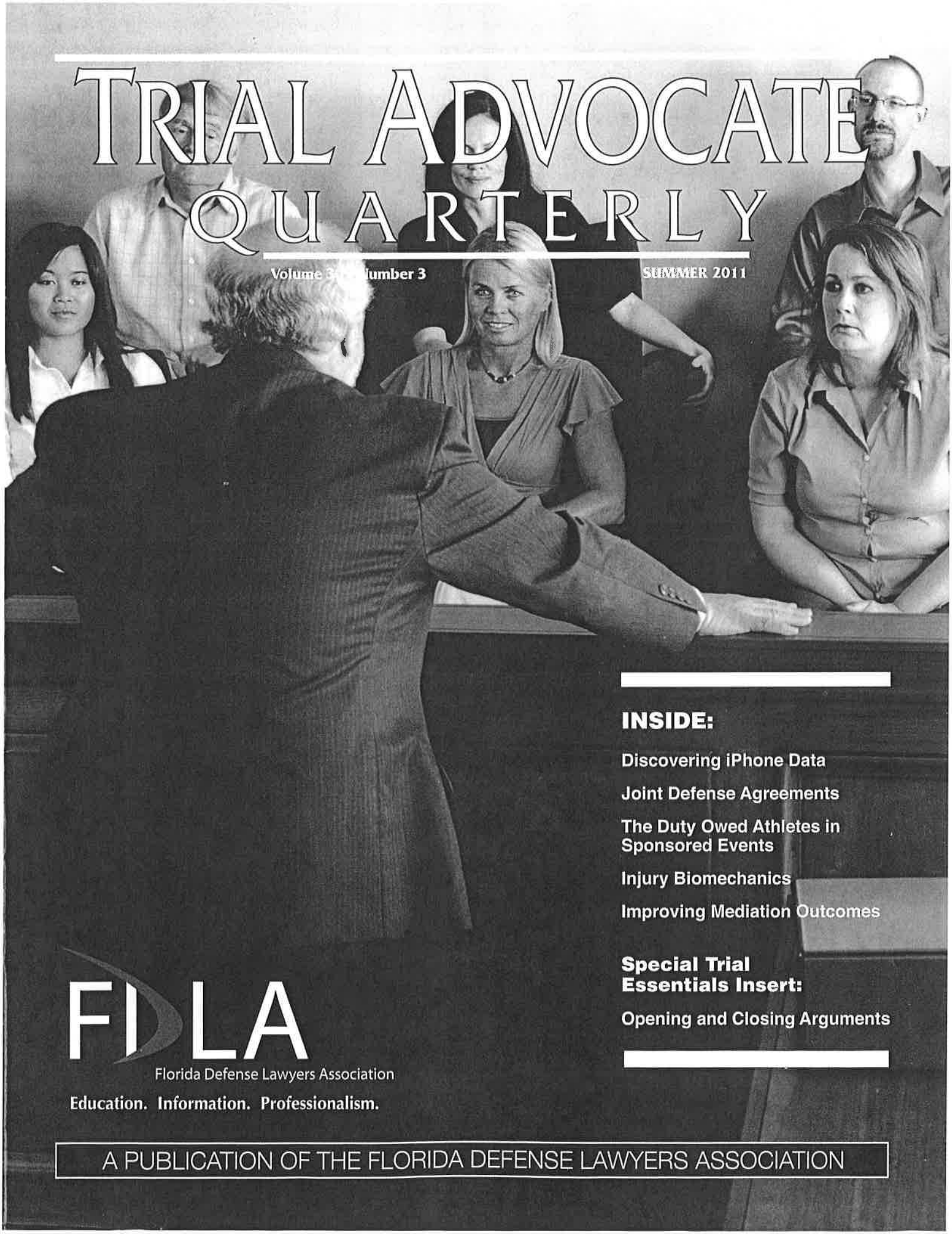

TRIAL ADVOCATE QUARTERLY

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FDLA

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Recent Legal Developments

By Esther E. Galicia

SUPREME COURT DECISIONS

1. Does the 21-day safe harbor requirement of section 57.105 apply to an action filed before the requirement became effective?

The Florida Supreme Court in *The Bionetics Corp. v. Kenniasty*, 36 Fla. Law Weekly S69 (Fla. Feb. 10, 2011), held that the 21-day safe harbor provision of section 57.105, Florida Statutes (2002), is substantive in nature and only applies prospectively. Accordingly, the safe harbor provision does not apply in a case where the purported frivolous claims were originally filed before the provision became effective and the motion for attorney's fees was filed after the provision took effect.

2. Are an insurer's attorney-client communications discoverable in first-party bad faith actions?

In *Genovese v. Provident Life & Accident Insurance Co.*, 36 Fla. Law Weekly S97 (Fla. March 17, 2011), the Florida Supreme Court held that attorney-client privileged communications are not discoverable in first-party bad faith actions. The insured in a first-party bad faith action may not discover privileged communications which occurred between the insurer and its counsel during the underlying action.

3. Is a consumer entitled to Magnuson-Moss Warranty Act attorney's fees when the manufacturer accepts the consumer's offer of judgment?

The Supreme Court in *Mady v. DaimlerChrysler Corp.*, 36 Fla. Law Weekly S117 (Fla. March 24, 2011), held that the defendant automobile manufacturer's acceptance of the plaintiff consumer's offer of judgment in his breach of warranty action rendered the consumer the prevailing party under the Magnuson-Moss Warranty Act. The plaintiff was thus entitled to recover attorney's fees pursuant to the Act.

4. How should various attorneys representing the personal representative and survivors in a wrongful death action be compensated?

According to *Wagner, Vaughn, McLaughlin & Brennan, P.A. v. Kennedy Law Group*, 36 Fla. Law Weekly S133 (Fla. April 7, 2011), where counsel for a personal representative cannot represent a survivor because of a conflict of interest, counsel is not entitled to a fee on that survivor's portion of the recovery. When survivors have competing claims and they are represented by different attorneys, the attorneys should be awarded fees in a manner commensurate with their work, providing for the proportional payment of attorney's fees by all survivors out of their respective awards. Furthermore, the personal representative's attorneys should be compensated out of the total settlement proceeds, reduced by the amount necessary to reasonably compensate the survivors' attorneys for work they performed in representing the survivors, assuming there is no evidence that the survivors' attorneys secured an increase in the settlement for the benefit of their clients.

5. Are short-term lessors of vehicles vicariously liable under Florida law for the negligent operation of their vehicles?

The court in *Vargas v. Enterprise Leasing Co.*, 36 Fla. Law Weekly S187 (Fla. April 21, 2011), held that section 324.021(9)(b)2, Florida Statutes (2007), which imposes vicarious liability on short-term lessors but places caps on the amount of damages for which they can be held vicariously liable, is preempted by the federal Graves Amendment, 49 U.S.C. §30106, which does not permit the imposition of vicarious liability. The Graves Amendment does not violate the Commerce Clause and section 324.021(9)(b)2 is not a financial responsibility law.

ABOUT THE AUTHOR

ESTHER E. GALICIA is a shareholder with Fowler White Burnett P.A. in Miami. Ms. Galicia specializes in civil litigation support and civil appeals at all levels. She is a member of The Florida Bar and is licensed to practice before the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the United States District Court for the Southern and Middle Districts of Florida. She is also a member of the Appellate Practice and Advocacy Section and Civil Appellate Practice Committee of The Florida Bar, the Dade and Broward County Bar Associations, the Defense Research Institute, and the FDLA. A long-time member of the *Trial Advocate Quarterly* Editorial Board, Ms. Galicia is a member of the Cuban American Bar Association and the Broward County Hispanic Bar Association. Ms. Galicia is AV-rated by Martindale-Hubbell.

FIRST DISTRICT DECISIONS

6. When is a claim for negligent infliction of emotional distress barred by the impact rule?

The First District in *Elliott v. Elliott*, 58 So. 3d 878 (Fla. 1st DCA 2011), found that the trial court erred in denying the defendant's motion for a directed verdict on the plaintiff siblings' action against their brother for negligent infliction of emotional distress allegedly caused by the brother's dismemberment of their mother's corpse, burning it in a barrel and scattering the remains without disclosing their location. The plaintiffs' claim was barred by the impact rule because they failed to establish a physical impact or sufficient physical injuries resulting from their brother's actions. Plaintiffs also failed to prove that they were involved in the events causing the negligent injury, given that they were not present during their brother's acts against their mother.

7. What standard should a judge apply when assessing the reasonableness of a nominal proposal for settlement?

In *Arrowood Indemnity Co. v. Acosta, Inc.*, 58 So. 3d 286 (Fla. 1st DCA 2011), the First District held that the trial court erred when it applied a wholly objective standard to determine whether the defendant insurer's $1,000 proposal for settlement was made in good faith. Trial courts are required to consider a defendant's explanation and determine whether, despite considering objective factors, the defendant had a subjectively reasonable belief on which to base its nominal offer.

8. May an employee appeal a summary judgment in favor of her codefendant employer?

The First District in *Wilson v. Liberty Mutual Insurance Co.*, 56 So. 3d 895 (Fla. 1st DCA 2011), determined that the defendant employee did not have standing to appeal a summary judgment, entered in favor of her codefendant employer, which found that the employer was not vicariously liable, as a matter of law, for the employee's conduct. The summary judgment did not adversely affect the defendant employee's rights against her employer.

9. When do defense counsel's statements entitle plaintiff to a new trial?

The district court in *Linzy v. Rayburn*, 58 So. 3d 424 (Fla. 1st DCA 2011), held that the trial court did not abuse its discretion in granting the plaintiffs' motion for new trial after a defense verdict where defense counsel violated rulings prohibiting statements concerning insurance, the financial status of either party or defendant's ability to pay any damages. Specifically, defense counsel repeatedly stated in closing argument that the small business owner who was not a named defendant would be solely responsible for any award of damages. Since the corporate defendant had insurance, this improperly appealed to the jury's sympathy and misled the jury.

SECOND DISTRICT DECISIONS

10. May plaintiff's counsel informally communicate with his client's nonparty treating physicians who are employed by the defendant hospital?

The Second District in *Lee Memorial Health System v. Smith*, 56 So. 3d 808 (Fla. 2d DCA 2011), held that the trial court properly denied the defendant hospital's request for a protective order prohibiting plaintiffs' counsel from having communications outside the presence of the hospital's counsel with the plaintiff minor child's treating physicians who were employed by the hospital. Florida Bar Rule 4-4.2(a) does not prohibit a plaintiff's attorney from informal communications with his or her client's treating physicians, absent consent, simply because the physicians are employed by the defendant hospital.

11. Must presuit notice be given to a pharmacist who allegedly negligently dispensed narcotics? Is presuit notice required when a hospital is sued for spoliation of evidence?

The district court in *Galencare, Inc. v. Mosley*, 59 So. 3d 138 D292 (Fla. 2d DCA 2011), held that the presuit notice requirements did not apply to the plaintiff's negligence action against pharmacists employed by the codefendant hospital and parent company of the hospital. While the plaintiff's action alleged that the decedent died while in the care of the hospital due to an overdose of narcotics, presuit notice to the pharmacist was not required because pharmacists are licensed under Chapter 465 of the Florida Statutes and therefore are not healthcare providers entitled to presuit notice under Chapter 766. Similarly, the defendant hospital was not entitled to presuit notice of plaintiff's spoliation claim against it for failure to maintain proper records that could support a claim against the defendant pharmacist where the plaintiff did not allege that the breach caused the "death or personal injury of any person."

THIRD DISTRICT DECISIONS

12. Is a party subject to sanctions when its expert's conduct results in a mistrial?

In *State Farm Mutual Automobile Insurance Co. v. Swindoll*, 54 So. 3d 548 (Fla. 3d DCA 2011), the Third District held that the trial court erred in awarding attorney's fees against the defendant insurance company as a sanction for a mistrial caused by the improper conduct of one of its expert witnesses during cross-examination. The record did not contain any

evidence, and there was no finding, of bad faith on the part of the insurance company itself. The order imposing sanctions was reversed without prejudice to the plaintiff's right to seek sanctions against the witness personally.

13. When may someone who hires an independent contractor be held liable for injuries sustained by the contractor's employee?

The Third District in *Fabregas v. North Miami Bakeries, Inc.*, 36 Fla. Law Weekly D363 (Fla. 3d DCA Feb. 16, 2011), reversed a summary judgment in favor of the defendant bakery in the personal injury action of an independent contractor's employee who fell while working at the bakery. Although one who hires an independent contractor is not generally liable for the injuries sustained by the contractor's employees, the Third District recognized that one of the several exceptions to that rule includes when an owner who has actual or constructive knowledge of latent or potential dangers on the premises fails to warn employees of the independent contractor of that danger.

14. Does DMV's letter to an insured that his policy has been cancelled satisfy the statutory notice requirements for cancelling an insurance policy?

In *Banton v. State Farm Mutual Automobile Insurance Co.*, 54 So. 3d 1062 (Fla. 3d DCA 2011), the Third District reversed a summary judgment for the insurer where an issue of fact existed as to whether the insurer's notice of cancellation was mailed or delivered to the insured by the insurer as section 627.728(3)(a), Florida Statutes (2008), requires. The fact that the Florida Department of Motor Vehicles sent the insured a letter advising him that his policy had been cancelled did not satisfy the section 627.728(3)(a) requirements for cancelling a policy. No legal authority exists in Florida that actual notice of an insurance policy's cancellation can be imputed to the insured by any means other than that provided by statute.

15. When is it inappropriate to disqualify an insurer's attorney?

The district court in *Continental Casualty Co. v. Przewoznik*, 55 So. 3d 690 (Fla. 3d DCA 2011), held that the trial court erred in disqualifying the plaintiff insurance company's attorney on the basis that the attorney had previously represented another insurance company in an action brought by the same defendant insured for damages sustained by the same vessel. The case did not involve circumstances where the insurer's law firm either disclosed confidences learned from representing the insured or switched sides in violation of the Rules of Professional Conduct.

16. Should summary judgment be granted in favor of the defendant when the condition causing plaintiff's slip and fall may not be open and obvious?

The Third District in *Rocamonde v. Marshalls Inc.*, 56 So. 3d 863 (Fla. 3d DCA 2011), held that the trial court erred in entering a summary judgment in favor of the defendant retail store on the ground that it did not have a duty to warn against a condition that is patent and obvious. A factual issue existed as to whether the protruding bottom portion of a mobile clothing rack within the defendant store, over which the plaintiff tripped and fell, was open and obvious.

17. May senior officers of an insurer be compelled to appear for deposition?

In *General Star Indemnity Co. v. Atlantic Hospitality of Florida, LLC*, 57 So. 3d 238 (Fla. 3d DCA 2011), the Third District found that the trial court departed from the essential requirements of law when it compelled two senior officers of the insurer to appear for deposition. The affidavit filed by the insurer established that the senior officers played no role in the investigation or adjustment of the insured's claims.

18. Is an insured entitled to obtain the insurer's work product and attorney-client privileged materials in a first-party bad faith action?

The district court in *State Farm Florida Insurance Co. v. Puig*, 36 Fla. Law Weekly D608 (Fla. 3d DCA March 23, 2011), held that the trial court did not err in requiring the defendant insurer in a first-party bad faith action to produce work product material in its claim file that was created before the resolution of the underlying litigation. However, the trial court did depart from the essential requirements of law in compelling the insurer to produce work product material prepared after resolution of the underlying litigation. The court also departed from the essential requirements of law in compelling the insurer to produce material protected by the attorney-client privilege, a privilege which is still available to insurers defending bad faith claims.

FOURTH DISTRICT DECISIONS

19. Does a defendant have standing to seek a continuance of the hearing on a co-defendant's motion for summary judgment?

The Fourth District in *Dickey v. Kitroser*, 53 So. 3d 1182 (Fla. 4th DCA 2011), held that the trial court abused its discretion in denying the defendants' motion for a continuance of the hearing on a codefendant's motion for summary judgment until discovery was completed. Contrary to the trial court's determination, the moving defendants had standing to oppose the

summary judgment because, if granted, they would be prevented from adding that codefendant as a *Fabre* defendant, even if later discovery established the codefendant's negligence.

20. Are facts known or opinions held by a treating physician subject to exclusion for noncompliance with the disclosure requirements of Rule 1.280(b)(4)?

In *Clair v. Perry*, 36 Fla. Law Weekly D345 (Fla. 4th DCA Feb. 16, 2011), the Fourth District concluded that the trial court did not abuse its discretion in granting a motion for new trial after determining that excluding the plaintiff's treating physician's testimony regarding permanency of injury had been erroneous. The plaintiff's treating physician was not an expert witness whose facts known and opinions held were subject to the pretrial notification requirements of Rule 1.280(b)(4). The treating physician's opinions regarding permanency were not acquired or developed in anticipation of litigation or for trial.

21. Does an executed form rejecting UM coverage bar a claim against an insurance agency and its agent for failure to procure UM coverage?

The district court in *Mitleider v. Brier Grieves Agency, Inc.*, 53 So. 3d 410 (Fla. 4th DCA 2011), found that the conclusive presumption created by an executed form rejecting uninsured motorist ("UM") coverage applies to cases against insurance companies for coverage, as well as claims against insurance agencies and their agents. The executed form rejecting UM coverage absolved the defendant insurance agency and its agent of liability for negligently failing to procure UM coverage.

22. Is an emergency room physician qualified to testify as an expert in a claim against a volunteer team physician?

The Fourth District in *Weiss v. Pratt*, 53 So. 3d 395 (Fla. 4th DCA 2011), held that the trial court did not err by permitting an emergency room physician to render an expert opinion concerning the defendant volunteer team physician's treatment of plaintiff on the football field, although the team emergency room physician was not an orthopedic surgeon or a volunteer team physician. Section 768.135, the statute relating to immunity of volunteer team physicians, was satisfied where both the emergency room physician and the defendant were licensed medical doctors. Additionally, the emergency room physician qualified as an expert witness under section 766.102(5) because he had the necessary expertise regarding what to do on the football field after an athlete's injury and whether to place the plaintiff on a backboard.

23. May a practical joke form the basis of a negligence claim?

In *Borrack v. Reed*, 53 So. 3d 1253 (Fla. 4th DCA 2011), the Fourth District held that the trial court erred in dismissing the plaintiff's second amended complaint with prejudice because the fact that the defendant's conduct was a practical joke did not foreclose a negligence action. Plaintiff alleged that the defendant had tricked her into believing that he had fallen into the lake and that she needed to jump in to save him, resulting in permanent injury to plaintiff when she jumped from a cliff into the lake.

24. Is a sexual molestation exclusion to coverage limited to the acts of an insured?

The district court in *Valero v. Florida Insurance Guaranty Association, Inc.*, 36 Fla. Law Weekly D450 (Fla. 4th DCA Mar. 2, 2011), affirmed the trial court's declaratory judgment that the insurer was not obligated to provide a defense or coverage on a negligent supervision action arising out of sexual molestation. The insurance policy excluded bodily injury arising out of sexual molestation and that exclusion, when read in the context of other exclusions expressly limiting the scope of the exclusion based on some action taken by the insured, contained no such express limitation. The policy's sexual molestation exclusion plainly applied to bodily injury arising out of sexual molestation "by any person."

24. Are the actions of a defense attorney retained by the defendants' father binding on the defendants?

The Fourth District in *Chancelor v. BWC Investments*, 57 So. 3d 969 (Fla. 4th DCA 2011), held that a motion to dismiss filed by the attorney retained by the defendants' father did not waive defects in service and result in establishing the court's personal jurisdiction over the defendants. The defendants did not personally retain counsel or authorize counsel to act on their behalf and the defendants attested that they were unaware of the litigation until the plaintiffs attempted to execute on the judgment.

FIFTH DISTRICT DECISIONS

25. Must a UM insured attend a compulsory medical examination before being able to file suit for and recover UM benefits?

The Fifth District in *State Farm Mutual Automobile Insurance Co. v. Curran*, 36 Fla. Law Weekly D195 (Fla. 5th DCA Jan. 28, 2011), held that an insured who refused to attend a compulsory medical examination was not entitled to recover uninsured motorist benefits. The policy provision requiring an insured who seeks

underinsured/uninsured (UM) benefits to attend a compulsory medical examination constitutes a condition precedent to the filing of a suit and recovery of UM benefits.

26. What must a party prove to recover attorney's fees when the party prevails on less than all of its claims?

In *Dr. Gail Van Diepen, P.A. v. Brown*, 55 So. 3d 612 (Fla. 5th DCA 2011), the plaintiffs were only entitled to recover attorney's fees for the time spent on their successful Fair Labor Standards Act (FLSA) claim. A party seeking fees on multiple claims must affirmatively demonstrate what portion of the legal services were expended on the claim for which it is authorized to recover attorney's fees. Thus, the Fifth District reversed the trial court's order awarding the plaintiffs' attorney's fees where their attorney failed to separate the time spent on the FLSA claim from the time spent on the unsuccessful claims after being given two opportunities to do so.

27. Must an attending obstetrician be a "participating physician" in order for the hospital which provided the required NICA notice to be entitled to NICA's protections?

The district court in *Orlando Regional Healthcare System, Inc. v. Gwyn*, 53 So. 3d 385 (Fla. 5th DCA 2011), found that the defendant hospital was not protected by Florida's Birth-Related Neurological Injury Compensation Act ("NICA") from a tort claim, even though it had given the statutorily-required NICA notice, where the only attending obstetrician at the time of the infant's delivery was not a "participating physician" as defined by NICA. Pursuant to section 766.31, Florida Statutes, the remedies and protections afforded by NICA are limited to those cases in which obstetric services were provided by a participating physician when the infant was born.

28. When are incident reports not discoverable?

The Fifth District in *Universal City Developments Partners, LTD v. Pupillo*, 54 So. 3d 612 (Fla. 5th DCA 2011), found that the trial court departed from the essential requirements of law when it required disclosure of an incident report involving the plaintiff and incident reports for substantially similar incidents for the prior three years. The plaintiff failed to show that the substantial equivalent material could not be obtained by other means, as necessary to obtain discovery of work product.

29. May a case be set for trial when motions for summary judgment are pending?

In *Parkinson v. Kia Motors Corp.*, 54 So. 3d 604 (Fla. 5th DCA 2011), the Fifth District denied a petition for writ of mandamus seeking to direct the trial court to set the trial date where the court did not refuse to set a date but instead offered to set a date in 2012. The district court nevertheless admonished the trial court that it is obliged to schedule a case for trial that is at issue and properly noticed, notwithstanding the pendency of motions for summary judgment.

30. When does a joint proposal for settlement by defendants trigger their entitlement to attorney's fees?

The district court in *Rossmore v. Smith*, 55 So. 3d 680 (Fla. 5th DCA 2011), found that the defendants were properly awarded attorney's fees pursuant to their joint offers of judgment. The two defendants each agreed to contribute $50 to the $100 settlement with plaintiff and requested the voluntary dismissal of the suit upon acceptance. The defendants' offer was properly differentiated and not otherwise improper.

31. Is use of the terms "guilty" and "innocent" grounds for a new trial in a civil matter?

In *Jackson v. Pena*, 58 So. 3d 303 (Fla. 5th DCA 2011), the Fifth District affirmed the trial court's denial of the plaintiffs' motion for a new trial predicated upon defense counsel's repeated use of the terms "guilty" and "innocent" when questioning witnesses or addressing the jury with regard to the defendants' standard of care. The jury's verdict did not need to be set aside because it was highly unlikely that defense counsel's comments affected the jury verdict; the trial court corrected defense counsel in the jury's presence, gave timely curative instructions and properly instructed the jury on the burden of proof before it deliberated.