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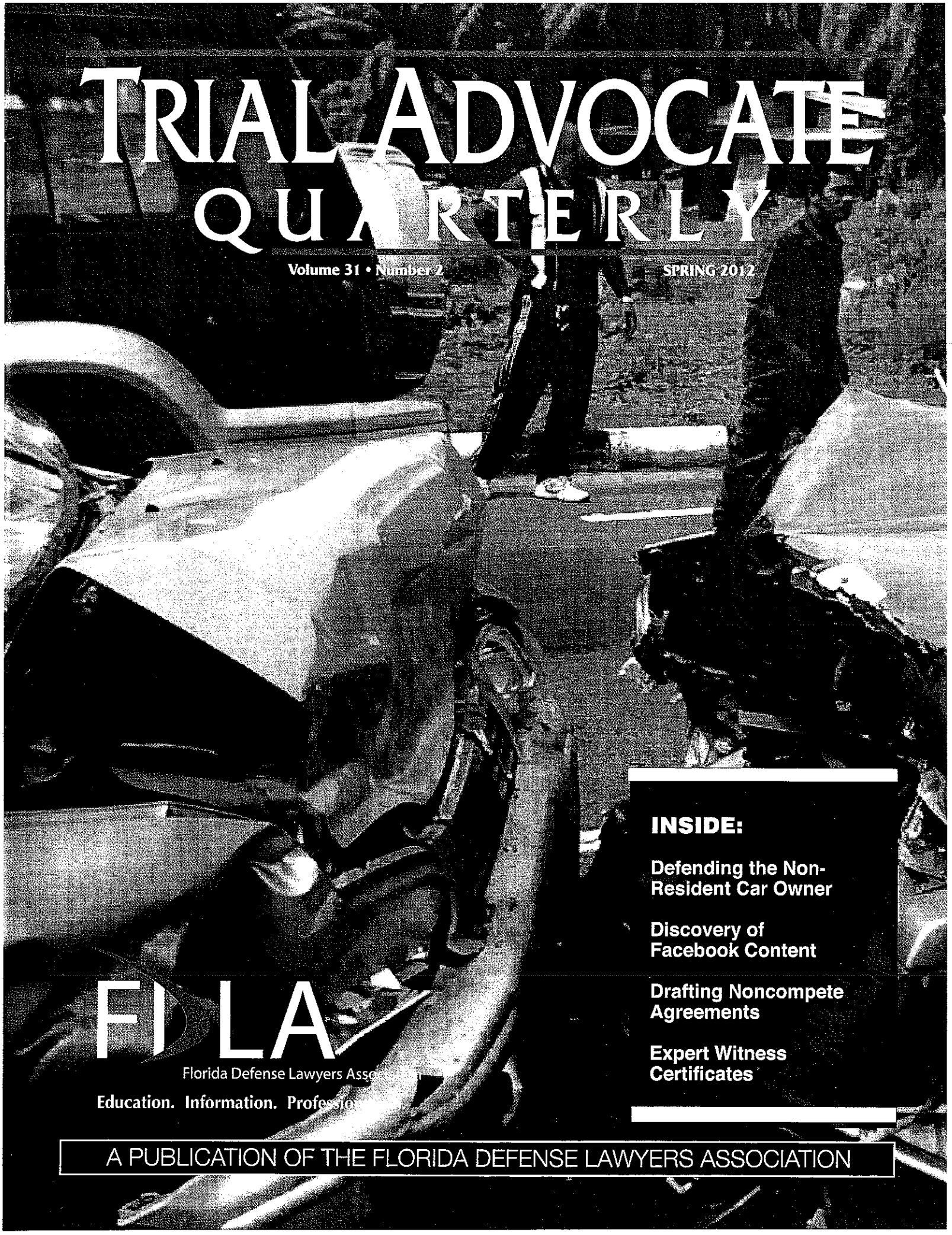

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FDLA

Florida Defense Lawyers Association

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A PUBLICATION OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION

Esther Galicia (Fowler White Burnett) practices appellate law and litigation/trial support. She has written the "Recent Developments" column since 1997, making her by far the most frequent *TAQ* contributor, and is a charter member of the Appellate Practice section of The Florida Bar, among many other memberships. An avid fan of the University of Miami's football team and the Florida/Miami Marlins, Esther also collects Romero Britto artwork.

Betsy Gallagher (Kubicki Draper, Tampa) concentrates on state and federal appeals and insurance coverage litigation. Extremely active in state and local bar associations, and a past chair of Outreach for the Appellate Practice Section of The Florida Bar, she also proudly serves on the board of trustees of the University of Florida Levin College of Law. Betsy, a twin, was a Father's Day surprise; she and her sister joined 16-month and 3-year-old siblings. Her undergraduate degree, from Cornell University, is in Floriculture and Ornamental Floriculture.

Christopher Hopkins (Akerman Senterfitt, West Palm Beach) has a general litigation practice including medical and nursing home litigation, construction, professional malpractice, and probate. Before going to law school, he obtained a master's degree from Wesley Theological Seminary. He is our go-to source for law and technology issues and has written numerous columns for the *TAQ* and other publications, in addition to developing two iPhone apps for Florida lawyers (more information is available at *www.clawapp.com*). He also brews his own sake, which he says is easier than brewing beer.

Miguel Roura (Banker Lopez Gassler) is the newest addition to the editorial board. After graduating from Stetson University College of Law in 2008, he spent two years honing his trial skills as an Assistant State Attorney in the Sixth Judicial Circuit. His practice is in the area of insurance defense, with an emphasis on personal injury defense and PIP litigation. Miguel finished the 2011 Ironman Florida, which required him to swim 2.4 miles in Panama City in November.

Robert Weill (Sedgwick LLP, Ft. Lauderdale) practices primarily appellate law, including litigation support; his areas of expertise include insurance coverage, bad faith law, and complex motion practice. He is a member of the Appellate Practice Section of The Florida Bar, and a frequent contributor to the TAQ. Rob is the second "surprise twin" on the editorial board, having arrived with a fraternal twin brother and little warning. Rob's gift for good timing came in handy when he was hired to clerk for then-Judge Harry Anstead immediately before Justice Anstead's elevation to the Florida Supreme Court. When not drafting briefs or petitions, he is a confessed crossword puzzle and movie addict.

These folks—and many who have come before them—are unsung heroes who do not always get the thanks they deserve! From a grateful editor, thank you.

RECENT LEGAL DEVELOPMENTS

By Esther E. Galicia

SUPREME COURT DECISIONS

1. Does an insured who rents a vehicle and allows the vehicle to be operated by an unauthorized driver under the rental agreement lose the coverage provided by her automobile insurance policy for temporary-substitute vehicles?

The Florida Supreme Court in *Chandler v. Geico Indemnity Co.*, 78 So. 3d 1293 (Fla. 2011), *reh'g denied* (Fla. Jan. 23, 2012), held that an insurer has a duty to defend and indemnify the insured in a negligence action against the insured where the insured rented a vehicle after her insured vehicle became disabled even though the rental agreement stated that no additional operators were authorized or permitted. The fact that the insured permitted the rental vehicle to be used by an unauthorized operator who, in turn, allowed the vehicle to be operated by another unauthorized operator who operated the vehicle in a negligent manner did not vitiate consent under Florida's dangerous instrumentality doctrine for purposes of defeating insurance coverage. An owner's consent to use a vehicle is not vitiated by third party agreements attempting to limit the scope of who may operate the vehicle.

2. When is an arbitration agreement against public policy? Who may decide the enforceability of an arbitration agreement which violates public policy?

In *Shotts v. OP Winter Haven, Inc.*, 36 Fla. Law Weekly S665 (Fla. Nov. 23, 2011), the Supreme Court ruled that the trial court, not an arbitrator, must determine the issue of whether an arbitration agreement is unenforceable on public policy grounds. Substantively, the limitations of remedies provisions in the arbitration section of the nursing home resident agreement violated public policy to the extent that the arbitrators did not, for example, have authority to award punitive damages, and the remedies provisions otherwise undermined specific statutory remedies created by the Legislature. In this regard, an arbitration agreement which substantially diminishes or circumvents legislatively created remedies stands in violation of Florida's public policy and is unenforceable. The district court further erred in ruling that the limitations of remedies provision calling for the imposition of the American Health Lawyers Association ("AHLA") rules was severable. Although the arbitration agreement contained a severability clause, the AHLA provision went to the very essence of the agreement and, if the provision were severed, the trial court would be forced to rewrite the agreement to add an entirely new set of procedural rules, burdens and standards. Finally, since the arbitration agreement did not contain a "delegation provision," in which the parties specifically agreed to arbitrate the enforceability of the agreement, the U.S. Supreme Court's recent decision in *Rent-A-Car West, Inc. v. Jackson*, did not apply and thus the trial court, not an arbitrator, needed to decide the issue.

3. Are limitation of liability provisions in an arbitration agreement severable? Who should decide whether an arbitration agreement violates public policy?

The Supreme Court in *Gessa v. Manor Care of Florida, Inc.*, 36 Fla. Law Weekly S676 (Fla. Nov. 23, 2011), concluded that the district court erred in ruling that the limitation of liability provisions in the arbitration clause, which place a $250,000 cap on noneconomic damages and waived punitive damages, were severable. Furthermore, those limitations violate public policy. The Supreme Court accordingly held that the district court erred in affirming the trial court's order which, in effect, allowed the arbitrator, not the court,

ABOUT THE AUTHOR

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to decide whether the arbitration agreement violated public policy.

4. Is the Supreme Court required to dismiss an appeal involving a certified question when the parties stipulated to dismissal?

In *Pino v. The Bank of New York*, 76 So. 3d 927 (Fla. 2011), the Florida Supreme Court stated that Rule of Appellate Procedure 9.350 does not require the Supreme Court to dismiss a case after the court has accepted jurisdiction based on a question certified to be one of great public importance and the petitioner has filed its initial brief on the merits. Dismissal is not required even if the parties filed a joint stipulated dismissal advising that they had settled the matter and agreed to dismissal of the review proceedings.

5. Is a blank application for medical staff privileges confidential or discoverable?

The Florida Supreme Court in *West Florida Regional Medical Center, Inc. v. See*, 37 Fla. Law Weekly S22 (Fla. Jan. 12, 2012), concluded that a blank application for medical staff privileges does not fall within the scope of the confidentiality provisions provided by sections 766.101(5) and 395.0191(8), Florida Statutes (2006). The court further concluded that Amendment 7 mandates disclosure of the blank application because, in plaintiff's action for negligent grant of medical staff privileges, the blank application is a record of an adverse medical incident. The blank application, upon which information was placed to generate the record of the medical staff application process and procedure, led to the alleged negligent grant of medical staff privileges, which led to the inflicted injury on plaintiff. The court also found that section 381.028(7)(b)1, Florida Statutes (2006), impermissibly attempts to limit the disclosure requirements of Amendment 7 and Amendment 7 is not preempted by the federal Health Care Quality Improvement Act.

6. Does a farm tractor constitute a dangerous instrumentality?

The Supreme Court in *Rippy v. Shepard*, 37 Fla. Law Weekly S31 (Fla. Jan. 19, 2012), held that a farm tractor is peculiarly dangerous in its operation so as to classify it as a dangerous instrumentality and justify the imposition of vicarious liability.

7. What type of presumption is created by section 627.7073(1)(c) with regard to engineering opinions concerning a sink-hole loss?

Florida's Supreme Court in *Universal Insurance Co. of North America v. Warfel*, 37 Fla. Law Weekly S50 (Fla. Jan. 26, 2012), interpreted the presumption created by section 627.7073(1)(c), Florida Statutes (2005), which provides that the findings, opinions, and recommendations of the engineer and professional geologist as to the verification or elimination of a sinkhole loss and the findings, opinions, and recommendations of the engineer as to land and building stabilization and foundation repair are presumed correct. The court found that the statutorily-created presumption is a vanishing or "bursting bubble" presumption governed by section 90.303 of Florida's Evidence Code, rather than a presumption affecting the burden of proof under section 90.304 of the Evidence Code. The trial court accordingly erred in instructing the jury that the presumption shifted the burden of proof to the insured in the insured's action to recover for losses allegedly caused by a sinkhole.

FIRST DISTRICT DECISIONS

8. May section 57.105 attorney's fees be imposed as a sanction for not having standing to file an appeal?

In *Martin County Conservation Alliance v. Martin County, Department of Community Affairs*, 73 So. 3d 856 (Fla. 1st DCA 2011), the First District found that an award of appellate attorney's fees pursuant to section 57.105 was appropriate where an administrative appeal was filed without citing material facts to support standing or then existing law to support the appeal based on material facts found below. The language of section 57.105 evidences a legislative intent to impose a mandatory penalty for bringing or failing to dismiss baseless claims or defenses.

9. When is a provision permitting the sharing of confidential information improper?

The First District in *Wal-Mart Stores East, L.P. v. Endicott*, 36 Fla. Law Weekly D2707 (Fla. 1st DCA Dec. 9, 2011), held that the sharing provision in a protective order which authorized disclosure of confidential information to "any attorneys, their staff, or expert witnesses in any other cases involving the issues of the underlying case" amounted to a departure from the essential requirements of law. The sharing provision was unwarranted because the potential collateral litigants were unknown, the only affirmation as to their need to view the confidential information were assertions of plaintiff's counsel, and the trial court simply could not engage in the required balancing test when there were no established potential litigants.

10. Under what circumstances are fees authorized pursuant to section 766.206(2)?

The district court in *Staples v. Duerr*, 76 So. 3d

1114 (Fla. 1st DCA 2011), found that the trial court properly awarded attorney's fees under section 766.206(2) against plaintiff's attorney in a medical malpractice action for the pre-suit costs incurred by the defense in investigating and evaluating the malpractice claim. However, the court erred in awarding attorney's fees for post-suit costs spent litigating entitlement to fees. Section 766.206(2) only authorizes pre-suit expenses incurred while investigating and evaluating a claim, not post-suit expenses incurred litigating entitlement to fees.

11. May an expert testify concerning the results of a government study which are consistent with the expert's opinions?

In *Duss v. Garcia*, 37 Fla. Law Weekly D106 (Fla. 1st DCA Jan. 6, 2012), the First District held that it is not improper bolstering to allow an expert to testify about the results of a government study such as one conducted by the National Institutes of Health.

12. When is it proper for a physician not to Baker Act a suicidal psychiatric patient?

The First District in *Tuten v. Fariborzian*, 37 Fla. Law Weekly D144 (Fla. 1st DCA Jan. 13, 2012), found no error in the trial court's dismissal of a wrongful death action where the physician did not Baker Act the deceased, who was admitted to a psychiatric facility after he attempted suicide and subsequently shot his wife and fatally shot himself when released from the facility. In the physician's professional opinion, the deceased was competent enough to give or withhold consent for treatment and thus involuntary placement would have been inconsistent with the plain requirements of the Baker Act. The district court also rejected the plaintiff's argument that the physician and psychiatric facility had a common law duty to keep the deceased committed against his will because the future behavior of a psychiatric patient is unpredictable, the risk of harm is not foreseeable and consequently no duty exists to lessen the risk or protect others from the type of risk a psychiatric patient may pose.

SECOND DISTRICT DECISIONS

13. When is an arbitration agreement not procedurally unconscionable and therefore enforceable?

The Second District in *Tampa HCP, LLC v. Bachor*, 72 So. 3d 323 (Fla. 2d DCA 2011), held that the trial court erred in denying a nursing home's motion to compel arbitration on the basis that the arbitration agreement was unconscionable. The evidence failed to show procedural unconscionability where the representative of the nursing home patient was not told she was required to sign the arbitration agreement to have her mother admitted; the representative was not rushed to sign; and the agreement clearly stated that the representative could review the agreement with a lawyer, that signing was not a precondition to admission and there was a period during which the representative could rescind the agreement after signing it. Given the absence of procedural unconscionability, the reviewing court did not need to address the representative's substantive unconscionability argument.

14. Must each instance of attorney misconduct be objected to when seeking a new trial based on the cumulative effect of counsel's repeated misconduct?

In *City of Tampa v. Companioni*, 74 So. 3d 585 (Fla. 2d DCA 2011), the Second District stated that a party seeking a new trial based on the cumulative misconduct of opposing counsel must object to each instance of misconduct and move for a mistrial in order to preserve the issue for purposes of a motion for a new trial. Absent such preservation, the alleged misconduct is subject to the stringent fundamental error analysis.

THIRD DISTRICT DECISIONS

15. Should a party be required to produce a surveillance video before deposing the subject of the video?

In *State Farm Mutual Automobile Insurance Co. v. H. Rehab, Inc.*, 77 So. 3d 724 (Fla. 3d DCA 2011), the Third District held that the circuit court, sitting in its appellate capacity, violated clearly established law by affirming the trial court's order granting a motion to compel production of a surveillance video before permitting the opposing party to take the deposition of the person who was videotaped.

16. May final judgments be vacated and re-entered to permit the filing of a motion for rehearing and provide sufficient time for assessing the viability of an appeal?

The Third District in *United Funding, LLC v. Brandao*, 77 So. 3d 710 (Fla. 3d DCA 2011), concluded that the trial court abused its discretion when it refused to vacate and re-enter final judgments that were not received until well after the time to move for rehearing had passed and only three days remained to file an appeal. Actual notice that the judgments were being entered did not cure the lack of timely formal notice.

17. Is evidence that an automobile insurer paid PIP benefits admissible in the insured's action for UM benefits?

The district court in *State Farm Mutual Automobile Insurance Co. v. Swindoll*, 36 Fla. Law Weekly D2718 (Fla. 3d DCA Dec. 14, 2011), held that the trial court erred in allowing the UM insured both to present evidence that the insurer paid the insured PIP benefits and to make the benefits a feature of the trial. The insurer refused to pay UM benefits on the ground that the medical treatment for which the insured sought payment did not stem from injuries incurred in the automobile accident. The erroneously admitted evidence was clearly intended to convince the jury that the insurer's payment of PIP benefits constituted an admission that the insured was entitled to recover UM benefits because the insurer had already determined that services for which payment was sought were reasonable, necessary, and related to the automobile accident. The law is, however, well established that evidence of an insurer's payment of PIP benefits is not relevant or admissible to prove the propriety of claimed medical damages in a UM action.

FOURTH DISTRICT DECISIONS

18. When is the plaintiff's failure to file the corroborating affidavit of a medical expert excused in a medical malpractice action?

The Fourth District in *Houston v. Geo*, 73 So. 3d 323 (Fla. 4th DCA 2011), found that the trial court erred in dismissing, on its own, a prison inmate's amended complaint alleging medical negligence where the inmate's failure to provide a corroborating medical expert opinion was excused by the fact that the defendants did not provide plaintiff the medical records he requested within 10-days of plaintiff's request. On remand, the trial court was ordered to conduct an evidentiary hearing in order to make findings of fact regarding the issue of whether, under the circumstances, the corroborating medical expert affidavit was in fact waived by defendants' failure to timely provide the requested medical records.

19. What facts warrant an intervening cause jury instruction?

In *Tucker v. Korpita*, 77 So. 3d 716 (Fla. 4th DCA 2011), the Fourth District held that the trial court erred in failing to give the requested jury instruction on intervening cause. Defendant's expert's testimony revealed that the treatment provided to plaintiff following the automobile accident was inappropriate and could have accelerated plaintiff's degenerative lumbar spine process.

20. How is harmless error established?

The district court in *Special v. Baux*, 36 Fla. Law Weekly D2503 (Fla. 4th DCA Nov. 16, 2011), receded from its prior "but for" harmless error test and adopted the following standard for harmless error in civil cases: "To avoid a new trial, the beneficiary of the error in the trial court must show on appeal that it is more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict."

21. Under what circumstances is a non-party treating physician subject to financial information discovery?

The Fourth District in *Katzman v. Rediron Fabrication, Inc.*, 73 So. 3d 1060 (Fla. 4th DCA 2011), held that the trial court did not abuse its discretion in denying a non-party physician's motion for protective order with regard to financial information, where the plaintiffs were referred to the physician by their lawyer for treatment following an automobile accident and the physician entered into a letter of protection agreement whereby the physician would be paid from any recovery the plaintiffs obtained in the lawsuit. The discovery at issue was relevant to show: that the physician might be biased based on his ongoing financial relationship with the plaintiffs or their lawyer; whether the physician/expert had recommended an allegedly unnecessary and costly procedure with greater frequency in litigation cases; and whether the physician allegedly overcharged for the medical services at issue. The limited intrusion into the physician's financial records was justified by the need to discover case-specific information relevant to the reasonableness of the cost and necessity of the procedure at issue.

22. When is a homeowner's insurance policy primary over an automobile insurance policy?

In *Sunshine State Insurance Co. v. Jones*, 77 So. 3d 254 (Fla. 4th DCA 2012), the Fourth District affirmed the trial court's finding that the homeowner's insurer, not the insurer under an automobile insurance policy, was liable for indemnity and the defense of claims against the insured who, while a passenger in a car driven by his girlfriend and owned by his girlfriend's parents, repeatedly reached over and grabbed the steering wheel without altering the direction of the vehicle. The accident occurred when the driver swerved as she was trying to push away her boyfriend, the insured, and thus was not covered by his automobile insurance policy. The boyfriend's grabbing of the steering wheel to annoy his girlfriend was not "use of . . . a non-owned auto" within the meaning of the automobile policy. Furthermore, the damages claimed did not fall within the provision of the homeowner's policy excluding claims for bodily

injury or property damage arising out of the ownership, maintenance, or use of a motor vehicle.

23. Is a claim for injuries as a result of a fall from a hospital test table subject to the medical malpractice statute of limitations and presuit requirements?

The district court in *Stubbs v. Surgi-Staff, Inc.*, 78 So. 3d 69 (Fla. 4th DCA 2012), affirmed the trial court's entry of a summary judgment in favor of the defendants in plaintiff's claim for injuries when she fell from a test table at the defendant hospital due to a nurse's failure to exercise reasonable care in assisting her onto a gurney when plaintiff had an allergic reaction to dye given to her for a CT scan. Plaintiff's claims were for medical negligence and thus were barred by the two-year statute of limitations and plaintiff's failure to comply with the presuit requirements.

FIFTH DISTRICT DECISIONS

24. May an insured be allowed to reopen her case to introduce the subject insurance policy into evidence before the trial court rules on the insurer's motion for directed verdict?

In *Grider-Garcia v. State Farm Mutual Automobile*, 73 So. 3d 847 (Fla. 5th DCA 2011), the Fifth District held that the trial court abused its discretion when it denied the insured's request to reopen her case prior to the court's ruling on the insurer's motion for a directed verdict. Reopening the case for purposes of permitting the plaintiff to introduce the insurance policy upon which the insured had based her claim would not prejudice the insurer. The insured's attorney's belief that the policy attached to the complaint was part of the evidence, while incorrect, was not unreasonable. The directed verdict entered in favor of the insurer due to the insured's failure to introduce the insurance policy into evidence was therefore reversed, and the case remanded for a new trial.

25. Does the failure to file a privilege log within the time to respond to discovery waive attorney-client privilege and work product objections?

The Fifth District in *Fifth Third Bank v. ACA Plus, Inc.*, 73 So. 3d 850 (Fla. 5th DCA 2011), found that the trial court departed from the essential requirements of law when it concluded that the petitioner implicitly waived its attorney-client privilege or work product objections to production by failing to file a privilege log within 30 days of service of the request to produce. The district court reasoned that Rule 1.280(b)(5) does not set forth a time by which a privilege log must be filed. Moreover, implicit waiver of the attorney-client privilege and work product immunity is not favored and is resorted to only when a serious violation occurs because those are extremely important protections.

26. Should defendants be permitted to file counterclaims alleging that a plaintiff's medical bills were not compensable and join the health care providers in the claim for declaratory relief?

The district court in *Berrios v. Deuk Spine*, 76 So. 3d 967 (Fla. 5th DCA 2011), held that the trial court did not abuse its discretion in dismissing the counterclaim filed by defendant alleging that plaintiff's medical bills were not compensable and seeking to make plaintiff's medical provider a party to the lawsuit for declaratory relief. The Fifth District reasoned that allowing a personal injury defendant to sue plaintiff's health care providers and join them to the litigation would undermine the physician-patient relationship and complicate the issues to be resolved in the personal injury suit. The trial court was thus well within its discretion not to allow defendant's counterclaim, particularly given the adverse impact on the plaintiff and health care providers. Nevertheless, the defendant could independently bring any legally cognizable claim it could assert against the medical provider.

27. Must a UM insured comply with the policy's compulsory medical examination provision in order to avoid forfeiting coverage?

In *State Farm Mutual Automobile Insurance Co. v. Curran*, 36 Fla. Law Weekly D2635 (Fla. 5th DCA Dec. 2, 2011), the Fifth District stated that the UM insured's breach of her insurance policy by failing to attend two scheduled compulsory medical examinations ("CME") and filing suit before complying with the CME provision in the policy did not defeat coverage where the insurer was not prejudiced by the breach. The district court reasoned that a CME provision is a "condition subsequent," the non-occurrence of which is an affirmative defense that the insurer has the burden of pleading and proving. The following questions were certified to the Florida Supreme Court: "When an insured breaches a CME provision in an uninsured motorist contract, (in the absence of contractual language specifying the consequences of the breach) does the insured forfeit benefits under the contract without regard to prejudice, or does the prejudice analysis described in *Bankers Insurance Co. v. Macias*, 475 So. 2d 1216, 1218 (Fla. 1985), apply?"; and "If prejudice must be considered, who bears the burden of pleading and proving that issue?"

28. What preparation time by an expert may the trial court consider when awarding expert witness fees?

The Fifth District in *Winter Park Imports, Inc. v. JM Family Enterprises, Inc.*, 77 So. 3d 227 (Fla. 5th DCA 2011), stated that a trial court may, when awarding expert witness fees, consider the time an expert expended in preparing for deposition, including the time reasonably and necessarily spent when conferring with counsel and in formulating his or her expert opinion through examination, investigation, testing, and/or research. The district court also pointed out that the Supreme Court has specifically stated that a trial court should exercise discretion in a manner consistent with the policy of reducing the overall cost of litigation and keeping such cost as low as justice allows.