TRIAL ADVOCATE QUARTERLY

Volume 31 • Number 3 SUMMER 2012

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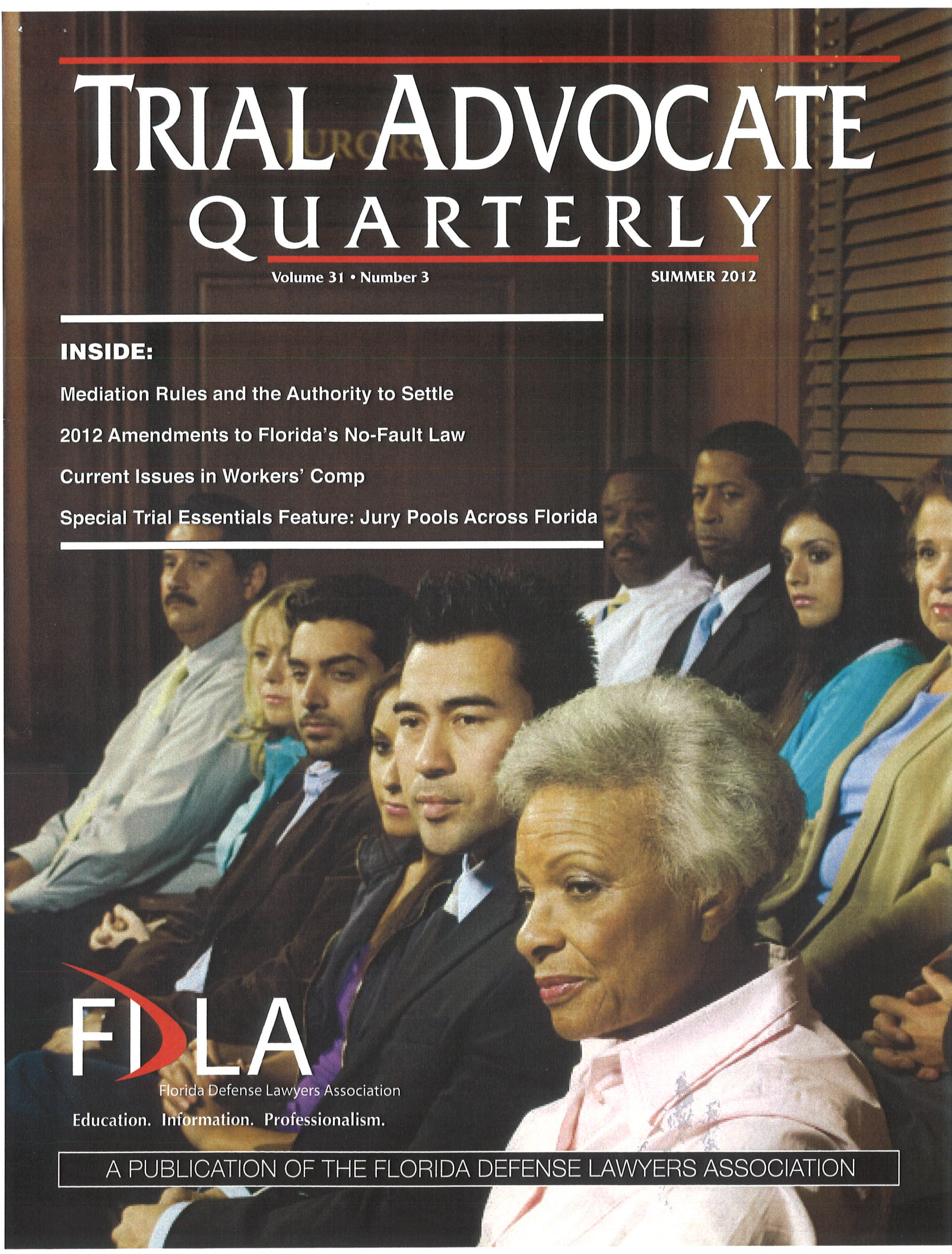

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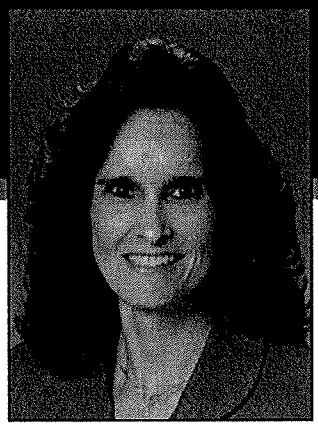
Recent Legal Developments

By Esther E. Galicia



SUPREME COURT DECISIONS

1. Are cases governed by another state's substantive law subject to section 768.79 attorney's fees?

The Florida Supreme Court in *Southeast Floating Docks, Inc. v. Auto-Owners Insurance Co.*, 82 So. 3d 73 (Fla. 2012), concluded that section 768.79, Florida's offer of judgment statute, which creates a substantive right to attorney's fees upon the satisfaction of certain conditions, does not apply to cases that are governed by the substantive of law of another jurisdiction.

2. Is a plaintiff's venue selection based on residency limited to the joint residency of multiple defendants?

In *Brown v. Nagelhout*, 37 Fla. L. Weekly S225 (Fla. March 15, 2012), the Supreme Court receded from its holding in *Enfinger v. Baxley*, 96 So. 2d 538 (Fla. 1957), that the selection of venue based on residency is limited to the county of residence shared by an individual defendant and a corporate defendant. The court announced that, where there are multiple defendants to an action, the plaintiff may choose as venue any county in which any defendant, without consideration of his or her codefendants, may be considered a resident.

3. Does the corporate shield doctrine apply when a corporate employee commits a tort in Florida?

Florida's Supreme Court in *Kitroser v. Hurt*, 85 So. 3d 1084 (Fla. 2012), held that where an individual, non-resident defendant commits negligent acts in Florida on behalf of his corporate employer, the corporate shield doctrine does not operate as a bar to personal jurisdiction in Florida over that individual defendant. Non-resident defendants are subject to jurisdiction in Florida under the long-arm statute if their alleged negligence occurred in Florida.

FIRST DISTRICT DECISIONS

4. May attorney's fees pursuant to section 57.105(1)(b) be awarded against a party represented by counsel?

The First District in *Waddington v. Baptist Medical Center of Beaches, Inc.*, 78 So. 3d 114 (Fla. 1st DCA 2012), held that the award of appellate attorney's fees to appellee pursuant to section 57.105 was to be paid entirely by the appellant's attorney as a sanction for filing a frivolous appeal. The appeal triggered section 57.105(1)(b) because appellant's counsel, in the amended initial brief, relied on previously made and ruled upon legal arguments which were wholly irrelevant to the summary judgment entered in favor of the appellee and presented no argument challenging the legal basis for the judgment. In this regard, section 57.105(3)(c) prohibits sanctioning a represented party under subsection (1)(b), which authorizes fees when a claim or defense is not supported by the application of then existing law to the material facts.

5. Is the "entire liability" as to the underlying claim for contribution purposes based on the settlement amount or the claim's potential value?

The district court in *Healthcare Staffing Solution, Inc. v. Wilkinson*, 37 Fla. L. Weekly D611 (Fla. 1st DCA March 12, 2012), found that for purposes of calculating pro rata share under Florida's contribution statute, the "entire liability" means the amount paid to settle a claim when there is no challenge to the

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reasonableness of the settlement. The trial court therefore erred in calculating the pro rata share of entire liability for the underlying claim based on the potential value of the claim rather than the amount paid to settle the claim.

6. Does the addition of blood banks to the class of health care providers protected by Chapter 766 apply retroactively?

In *Fitchner v. Lifesouth Community Blood Centers, Inc.*, 37 Fla. L. Weekly D886 (Fla. 1st DCA April 13, 2012), the First District determined that the 2003 statutory amendment to the medical malpractice statutes including blood banks within the class of health care providers protected by the presuit screening requirements does not apply retroactively to a cause of action that accrued prior to the effective date of the amendment. The amendment only applies prospectively because it alters the substantive rights of parties, in that it adds a condition that can operate to bar a cause of action entirely.

SECOND DISTRICT DECISIONS

7. Are statements of persons not involved in a car accident protected by the accident report privilege?

In *Sottilaro v. Figueroa*, 37 Fla. L. Weekly D330 (Fla. 2d DCA Feb. 8, 2012), the Second District held that the trial court erred in ruling that a traffic fatality investigation report, which included statements by witnesses that the decedent had been looking down at his phone and texting while crossing the highway, was inadmissible under the accident report privilege. That privilege only applies to a driver, owner, or occupant of a vehicle because those are the only people compelled to make a report. Furthermore, the accident report privilege does not apply to witnesses who were not involved in the accident.

8. Is an offer to settle made in good faith when it is directed to the active tortfeasor and preserves the claim against a vicariously liable defendant?

The Second District in *McGregor v. Molnar*, 79 So. 3d 908 (Fla. 2d DCA 2012), held that the trial court erred in finding that a plaintiff's offer to settle a claim against a negligent tortfeasor, which reserved the plaintiff's right to proceed against a vicariously liable tortfeasor, was not made in good faith. The fact that the offer did not conclude the litigation with regard to the vicariously liable defendant was irrelevant to a finding of good faith. Moreover, the fact that the offer, if accepted, would have provided the plaintiff with funds to proceed with the litigation is a valid strategic reason for the offer, and did not preclude a finding that the offer to settle was made in good faith.

9. How much deference is accorded to a successor judge who did not preside over the trial when the successor judge rules on the post-trial motions?

The district court in *Sullivan v. Kanarek*, 79 So. 3d 900 (Fla. 2d DCA 2012), observed that, where a presiding judge is not available to rule on a motion for new trial because she has been disqualified, the successor judge's ruling on the motion for new trial is not afforded the same deference as would be afforded if the judge had presided over the trial. Here, the successor judge improperly denied a motion for new trial even though the plaintiff did not move for a mistrial after plaintiff's objections to defense counsel's misconduct had been sustained. Defense counsel's record evidence behavior and the trial judge's concern regarding non-record behavior would have justified the trial judge ruling that fundamental error occurred, requiring the granting of a new trial.

10. May defendants' joint offer of judgment condition acceptance on the dismissal of the pending claims against both defendants? When is a plaintiff entitled to prevailing party costs?

The Second District in *Wolfe v. Culpepper Constructors, Inc.*, 37 Fla. L. Weekly D505 (Fla. 2d DCA Feb. 29, 2012), determined that the trial court erred in concluding that defendants' joint offer of judgment, conditioned upon the plaintiff dismissing its then-pending claims against both defendants, was per se invalid. The defendants were entitled to an award of attorney's fees because their joint offer met all statutory and rule requirements, and the plaintiff's recovery was considerably less than 25% of the offer. The plaintiff was entitled to an award of costs as the prevailing party, however, where the plaintiff obtained a net judgment against the defendants.

11. When is the *Stuart v. Hertz* jury instruction regarding responsibility for subsequent medical negligence appropriate?

In *Pedro v. Baber*, 83 So. 3d 912 (Fla. 2d DCA 2012), the district court held that the trial court did not abuse its discretion in instructing the jury, based on *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1997), that a tortfeasor is responsible for additional injuries caused by the subsequent medical negligence of a physician treating the plaintiff for the original injuries. The defendant's expert had opined that the back surgery performed on plaintiff in an attempt to alleviate the back pain plaintiff experienced following the accident was unnecessary to treat the injuries

sustained in the accident and recognized that plaintiff had an impairment rating based on that surgery. The instruction was also appropriate because the treating physician's care was called into question by defense counsel during closing argument.

12. Is the defense of lack of personal jurisdiction waived by counsel's notice of appearance or motion for extension of time?

The District in *DiGiovanni v. BAC Home Loans Servicing, L.P.*, 83 So. 3d 934 (Fla. 2d DCA 2012), stated that the filing of a notice of appearance by defendant's counsel does not waive the defendant's right to claim lack of personal jurisdiction. Moreover, a motion for an extension of time does not constitute a general appearance, even though counsel used the phrase "hereby make a general appearance on behalf of defendant" in his notice of appearance, because a filing does not constitute a general appearance unless it seeks affirmative relief on the merits of the case.

13. When is fraud on the court not grounds for dismissal with prejudice?

The district court in *Pena v. Citizens Property Insurance Co.*, 37 Fla. L. Weekly D946 (Fla. 2d DCA April 20, 2012), held that the trial court properly dismissed the insureds' first-party insurance action seeking additional funds for the repair of damages on the ground of fraud on the court. Plaintiffs filed false affidavits regarding their contract with a contractor to repair damages, a condition precedent to filing suit. However, the trial court was held to have abused its discretion by dismissing the complaint with prejudice on the basis of a procedural irregularity where the insurer failed to establish that there was either no breach or no damages.

THIRD DISTRICT DECISIONS

14. Is an employer who fails to notify its workers' compensation insurer of the plaintiff employees' injuries entitled to workers' compensation immunity? Is the employer estopped from contending that its employees' injuries were work-related?

The Third District in *Ocean Reef Club, Inc. v. Wilczewski*, 37 Fla. L. Weekly D694 (Fla. 3d DCA March 21, 2012), held that where beauty salon employees gave notice to their employer of injuries resulting from exposure to chemical fumes inherent in the salon, but the employer did not file claims with the workers' compensation insurance carrier, the employer was barred from claiming workers' compensation tort immunity. Moreover, because the employer notified the carrier of the employees' injuries once suit was filed and the carrier denied coverage on the grounds that the injuries were not work-related, the carrier's denial was imputed to the employer, who could not now claim that the injuries were, in fact, work-related. The Third District held that the employer was estopped from taking an inconsistent position that the plaintiffs' injuries occurred during the course and scope of employment when sued in tort, after the workers' compensation carrier had determined that the injuries did not occur during the course and scope of employment.

15. Does the notice of intent to sue provided to a physician satisfy the notice requirement as to a hospital with which the physician has a relationship?

In *King v. Baptist Hospital of Miami, Inc.*, 37 Fla. L. Weekly D830 (Fla. 3d DCA April 11, 2012), the Third District concluded that the notice of intent to initiate litigation sent to a physician and a pediatrics surgical group was sufficient to impute notice to the defendant hospital where there was a legal relationship between the physician and the hospital. The district court therefore reversed the dismissal of the complaint against the hospital, which sufficiently alleged a joint venture agreement between the hospital and university in which the physician actively participated; the joint venture agreement provided the requisite legal relationship between the hospital and physician so that notice to the physician constituted notice to the hospital.

FOURTH DISTRICT DECISIONS

16. When should a directed verdict be granted in favor of a hospital with regard to the alleged negligence of its nursing staff?

In *Hollywood Medical Center, Inc. v. Alfred*, 82 So. 3d 122 (Fla. 4th DCA 2012), the Fourth District concluded that the trial court erred in denying a hospital's motion for directed verdict which alleged that the plaintiff had failed to prove that any negligence by the hospital's nursing staff caused the deceased's death. While the evidence established that an emergency room physician was negligent in failing to intubate the deceased, and that nurses had breached a duty by checking a box indicating that the deceased needed less intensive care than was required, there was no evidence that the nursing staff's negligence was a cause of death. No one testified that the nurses had a duty to intubate, or that checking the box for the proper level of care and checking the deceased's vital signs immediately or more frequently would have affected the outcome.

17. May an insurer accept premium payments after a policy has expired and deny coverage for an accident which occurred before the policy was reinstated?

In *Progressive Express Insurance Co. v. Camillo*, 80 So. 3d 394 (Fla. 4th DCA 2012), the Fourth District found that the trial court erred in ruling that an insurer's unconditional acceptance of a premium waived its right to claim that there had been a lapse in coverage. Where the policy expired without the insured making a renewal payment and an accident occurred after the policy expired, the insurer could subsequently accept premium payments and reinstate the policy prospectively without waiving the right to deny coverage for the accident. In reversing the summary judgment for the insured, the district court found that material issues of fact remained as to whether a potentially misleading bill that the insurer sent to the named insured, which incorrectly listed the renewal policy period, supported the insured's estoppel argument.

18. Must a medical malpractice action be dismissed with prejudice when a written corroborating medical expert opinion is not provided before the limitations period runs?

In *Berry v. Padden*, 37 Fla. L. Weekly D743 (Fla. 4th DCA March 28, 2012), the Fourth District determined that the trial court properly dismissed with prejudice a medical malpractice complaint where the plaintiffs failed to provide a verified, written corroborating medical expert opinion prior to the expiration of the statute of limitations. The plaintiffs did not satisfy the statutory requirements by merely providing an unverified expert opinion prior to the expiration of the limitations period.

19. Is expert testimony necessary to establish the reasonableness of attorney's fees sought pursuant to the wrongful act doctrine?

The Fourth District in *Schwartz v. Bloch*, 2012 WL 2012321 D795 (Fla. 4th DCA June 6, 2012), held that expert testimony as to the reasonableness of attorney's fees is not required where the plaintiff is seeking fees as an element of compensatory damages under the wrongful act doctrine. The district court concluded that the trial court erred in striking the jury award of attorney's fees due to the plaintiff's failure to present independent expert testimony on the reasonableness issue.

FIFTH DISTRICT DECISIONS

20. When does defense counsel's conduct justify granting the plaintiff a new trial?

The Fifth District in *Irizarry v. Moore*, 37 Fla. L. Weekly D313 (Fla. 5th DCA Feb. 3, 2012), determined that the trial court abused its discretion in denying plaintiff's motion for new trial based on the pervasive effect of defense counsel's conduct. Counsel's egregious behavior, such as using the terms "guilty" and "innocent" in describing the burden of proving negligence, and suggesting that plaintiff's claim was fraudulent without evidence, led to the finding that there was no confidence the plaintiff received a fair trial, particularly in light of the totality of defense counsel's improper trial behavior and misconduct.

21. From whose recovery are attorney's fees paid when awarded pursuant to a rejected offer of settlement in a wrongful death action?

In *Kadlecik v. Haim*, 79 So. 3d 892 (Fla. 5th DCA 2012), the Fifth District concluded that the non-settling defendants who prevailed in a wrongful death action were entitled to recover fees from the estate based on the personal representative's rejection of defendants' reasonable offer of settlement. However, those fees could not be recovered from the settlement funds allocated to the survivor under the Wrongful Death Act. Consequently, the district court determined that the trial court erred in requiring the personal representative to pay the defendant's attorney's fees claim before distributing the settlement proceeds to himself as the sole survivor.

22. Are a planting bed and stump within it dangerous conditions which render the property owner liable?

The Fifth District in *Dampier v. Morgan Tire & Auto, LLC*, 82 So. 3d 204 (Fla. 5th DCA 2012), stated that a planting bed, and a stump within the planting bed, do not constitute a dangerous condition that could give rise to liability on the part of the defendant due to an alleged failure to maintain the premises in a reasonably safe condition. The district court held that the defendant did not have to warn the plaintiff of the danger of walking in the planting bed because neither the planting bed nor the stump constitute a dangerous condition when used as a planting bed and not for walking, and affirmed the summary judgment for the defendant.