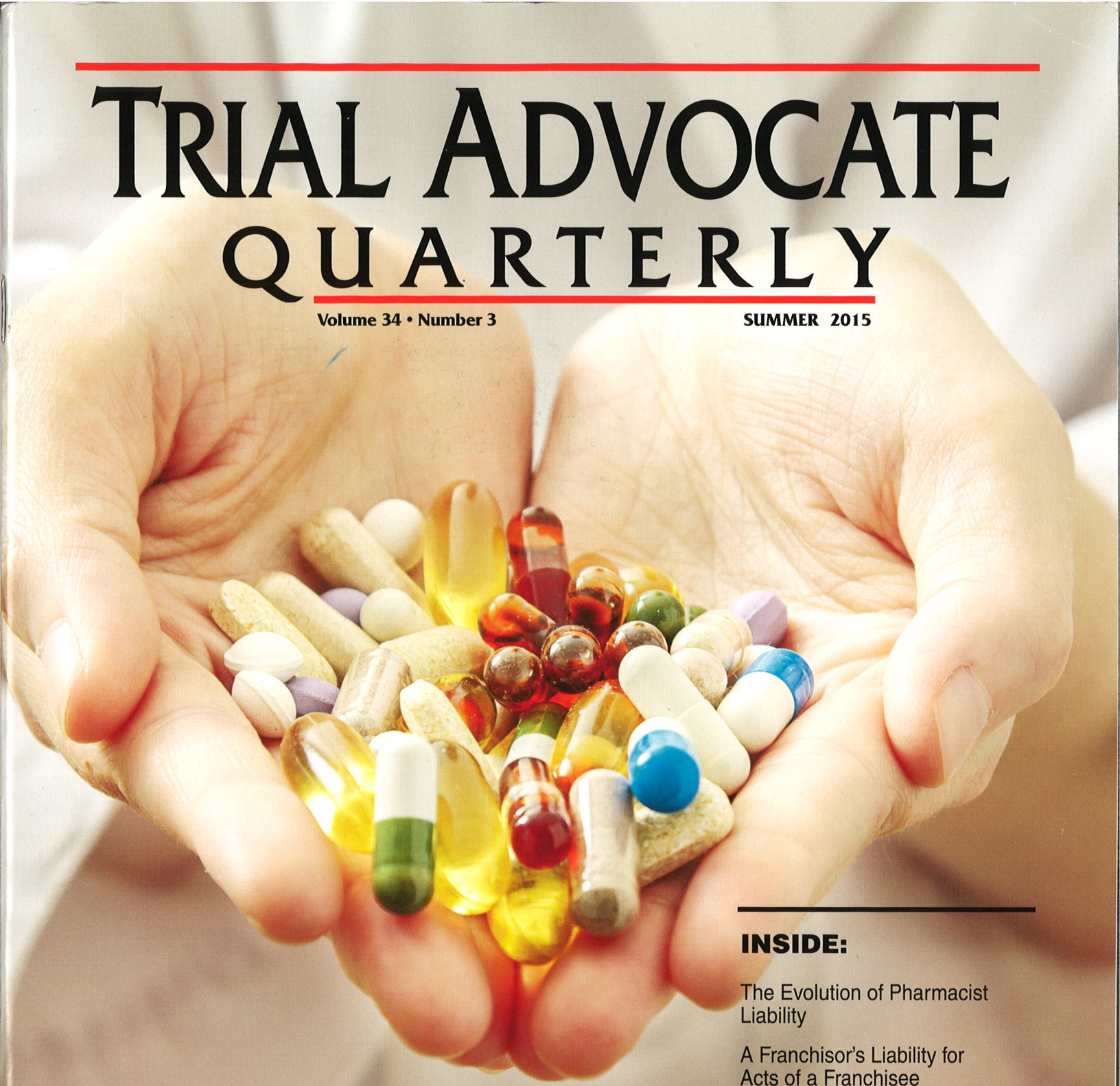
TRIAL ADVOCATE QUARTERLY

Volume 34 • Number 3 SUMMER 2015



INSIDE:

LEADERSHIP • PROFESSIONALISM • EDUCATION

FDLA

FLORIDA DEFENSE LAWYERS ASSOCIATION

A PUBLICATION OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION

Recent Legal Developments

By Esther E. Galicia

SUPREME COURT DECISIONS

1. Must a return of service set forth the section 48.031(1)(a) "manner of service" factors in order to be facially valid?

The Florida Supreme Court in *Koster v. Sullivan,* 160 So. 3d 385 (Fla. 2015), held valid return of service is not required to expressly list the factors defining the "manner of service" contained in section 48.031(1)(a), Florida Statutes (2009), which are not included in the requirements of section 48.21 defining invalid service. The language in section 48.21 does not expressly incorporate section 48.031, nor does it refer to the factors contained within section 48.031(1)(a). On the other hand, section 48.21 clearly states the information that must be included in a return of service. Accordingly, section 48.21 cannot be read to require the factors set forth in section 48.031(1)(a).

2. Are exculpatory clauses required to specifically refer to "negligence" or "negligent acts" in order to be enforceable?

In *Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256 (Fla. 2015), the Florida Supreme Court distinguished indemnity agreements from exculpatory clauses and declined to apply the specificity requirements it imposed in the indemnity context, over 40 years ago, in *University Plaza Shopping Center, Inc. v. Stewart*, 272 So. 2d 507 (Fla. 1973), to exculpatory clauses. The court accordingly approved a Fifth District decision reversing the trial court's denial of the defendant's motion for summary judgment, holding that the exculpatory clause releasing the defendant from liability for "any and all claims and causes of action of every kind arising from any and all physical or emotional injuries and/or damages which happened to me/us" barred plaintiff's negligence actions despite the lack of a specific reference to "negligence" or "negligent acts" in the exculpatory clause. Thus, the absence of the terms "negligence" or "negligent acts" in an exculpatory clause do not render the agreement *per se* ineffective to bar a negligence action.

3. Does the original named insured's waiver of UM benefits obviate the need for an insurer to obtain a waiver from a subsequent new and sole insured?

The Supreme Court in *Chase v. Horace Mann Insurance Co.*, 158 So. 3d 514 (Fla. 2015), found a new automobile insurance policy was created where the sole named insured's name was removed from the policy and his daughter was listed as a named insured for the first time. Accordingly, the court held that the insurer was required to advise the daughter of her right to uninsured motorist benefits equal to her liability limits and to obtain a written waiver of those benefits before reducing them under section 627.727. The original insured's waiver of uninsured motorist benefits did not, moreover, apply to the daughter's policy.

4. Should a plaintiff who serves a proposal for settlement intended to also settle the spouse's consortium claim apportion the amount requested between the two plaintiffs/spouses?

The Florida Supreme Court in *Audiffred v. Arnold*, 161 So. 3d 1274 (Fla. 2015) (Fla. 2015), held that a proposal for settlement by the plaintiff-wife which would also resolve her plaintiff-husband's loss of consortium claim was a joint proposal but was, however, invalid because it did not apportion the amount between the two plaintiffs. Section 768.79 and Rule 1.442 mandate apportionment under the circumstances to eliminate any ambiguity with regard to the resolution of claims by the two plaintiffs against the sole defendant.

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.

5. Must defendants who serve a joint proposal for settlement apportion the amount being offered by each defendant?

In *Pratt v. Weiss*, 161 So. 3d 1268 (Fla. 2015), the Florida Supreme Court held that the trial court erred in awarding attorney's fees to the defendants pursuant to section 768.79. The joint proposal for settlement by the two defendants was invalid because it did not apportion the amount attributable to each offeror, and thus they failed to strictly adhere to the requirements of section 768.79 and Rule 1.442 to be eligible for an award of attorney's fees.

FIRST DISTRICT DECISIONS

6. Under what circumstances may an insurer be deemed to have waived an insured's material misrepresentations?

The First District in *Echo v. MGA Insurance Co.*, 157 So. 3d 507 (Fla. 1st DCA 2015), held that although the insured claimant made material misrepresentations in the insurance application warranting rescission of the policy, the trial court erred in failing to consider the claimant's arguments that the insurer waived the misrepresentations or confessed judgment when it made payments to the claimant's medical care providers after the claimant filed suit. The district court recognized caselaw establishing that an insurer can forfeit its right of rescission.

7. Does an amended complaint which substitutes one spouse for the other spouse as the proper defendant relate back to the date the suit was originally filed?

In *Russ v. Williams*, 159 So. 3d 408 (Fla. 1st DCA 2015), the First District affirmed the trial court's decision that the plaintiff's amended complaint was barred by the statute of limitations and did not relate back to the date the original complaint was filed. The original complaint only sued the defendant husband, and the proposed amended complaint sought to substitute the defendant's wife as the sole defendant. The "identity of interest" exception to the relation back doctrine did not apply because a tort action against one spouse is separate and distinct from an identical tort suit against the other spouse. The district court recognized that, under Florida law, one spouse is not responsible for the torts of the other.

8. Does the absence of a certificate of service or the use of the wrong pronoun to describe the plaintiff render a proposal for settlement invalid?

The First District in *Floyd v. Smith*, 160 So. 3d 567 (Fla. 1st DCA 2015), held that section 768.79 of the Florida Statutes and Florida Rule of Civil Procedure 1.442 do not require a proposal for settlement to contain a certificate of service. Additionally, the proposal for settlement was not rendered ambiguous by its reference to "his claims" instead of "her claims" where only one plaintiff had asserted any claims.

9. May a statutory amendment which changes the determination of post-judgment interest be applied to a judgment that was entered before the effective date of the amendment?

In *R.J. Reynolds Tobacco Co. v. Townsend*, 160 So. 3d 570 (Fla. 1st DCA 2015), the district court held that the 2011 amendment to section 55.03, Florida Statutes, which provides for the post-judgment interest rate to be adjusted annually, applies to any post-judgment interest accrued after the effective date of the amendment even if the judgment was entered before the amendment's effective date. The First District certified the following question to the Florida Supreme Court as one of great public importance: "Does the language of section 55.03(3), Florida Statutes (1998), provide that the Legislature intended to abandon the common law rule that post-judgment interest rates change on existing judgments when the legislature changes the rates such that the 2011 amendments to section 55.03, Florida Statutes do not apply to a judgment entered prior to July 1, 2011?"

SECOND DISTRICT DECISIONS

10. Does a plaintiff need to provide corroborating medical expert affidavits which address all alleged departures from the standard of care?

The Second District in *University of South Florida Board of Trustees v. Mann*, 159 So. 3d 283 (Fla. 2d DCA 2015), held that the trial court departed from the essential requirements of law in denying the defendant hospital's motion to dismiss a count seeking to hold the hospital liable for the nursing staff's and nursing supervisors' departures from the standard of care. The plaintiff's presuit corroborating medical expert affidavit did not address breaches from the standard of care by the nursing staff or supervisors, so the affidavit was clearly insufficient to corroborate reasonable grounds to support that claim.

11. May the time to request a trial *de novo* from an arbitration decision served by mail be extended five days?

In *Harold v. Sanders*, 159 So. 3d 338 (Fla. 2d DCA 2015), the Second District interpreted Florida Rule of Civil Procedure 1.090(e) as extending the time for a party to request a trial de novo by five days when the arbitrator's decision in a court-ordered nonbinding arbitration is served by mail. Thus, the trial court's entry of a final judgment was premature where one of the parties to the arbitration timely filed an objection and demand for trial *de novo* in response to the arbitrator's decision.

THIRD DISTRICT DECISIONS

12. Should a plaintiff notify the defendant of the plaintiff's application for a default where the plaintiff knew, through counsel's pre-suit contacts, that the defendant was represented by an attorney and intended to defend the case?

The Third District in *M.W. v. SPCP Group V, LLC*, 163 So. 3d 518 (Fla. 3d DCA 2015), found that the trial court did not commit a gross abuse of discretion in setting aside an *ex parte* default where the default was obtained even though the plaintiff's attorney knew from pre-suit contacts that the defendant was represented by counsel and intended to defend on the merits. Plaintiff's counsel should have served a notice of application for default under those circumstances and the defendant's attorneys alleged uncooperativeness, neglect or incompetence did not excuse the plaintiff's failure to give the notice required by due process.

13. May section 57.105(1) attorney's fees for a frivolous appeal be imposed against an attorney only?

In *Faddis v. The City of Homestead*, 157 So. 3d 447 (Fla. 3d DCA 2015), the district court indicated that it had no qualms about imposing Section 57.105(1) attorney's fees against an attorney ***only***, under the right set of facts and circumstances. *Faddis* involved a frivolous appeal of the trial court's order imposing monetary sanctions against the attorney and his client for fraud on the court.

14. When is a medical school entitled to NICA immunity?

The Third District in *University of Miami v. Ruiz*, 164 So. 3d 758 (Fla. 3d DCA 2015), determined that the University of Miami School of Medicine, which is neither a hospital nor a physician participating in the NICA plan, was entitled to immunity from suit for its direct liability even though it was not required to provide NICA notice. However, NICA immunity did not apply to the plaintiff's allegations against the medical school based on its vicarious liability for the medical malpractice of its employees, who waived their personal NICA immunity by failing to provide the statutorily-required notice of NICA participation. The decision replaces an earlier opinion issued February 11, 2015, following a motion for clarification.

FOURTH DISTRICT DECISIONS

15. Does the litigation privilege apply to statements made during the deposition of a non-party?

In *McCullough v. Kubiak*, 158 So. 3d 739 (Fla. 4th DCA 2015), the Fourth District concluded that the trial court properly dismissed the plaintiffs' defamation action and related negligence claims based on the absolute litigation privilege accorded to defendants' statements, during a non-party witness's deposition, allegedly disparaging plaintiffs' litigation practices in similar cases. Defendants' statements were made during the course of a judicial proceeding and bore some relation to the settlement negotiations in that proceeding; thus, they were absolutely privileged.

16. When is it proper not to instruct the jury concerning the foreign-body presumption of negligence?

The district court in *Dockswell v. Bethesda Memorial Hospital, Inc.*, 40 Fla. L. Weekly D480 (Fla. 4th DCA Feb. 18, 2015), held that the trial court did not err in refusing to give the requested instruction on the presumption of negligence arising from the discovery of the presence of a foreign body where the plaintiffs were able to present direct evidence of negligence. Plaintiffs' claim arose out of an incident in which a nurse at the defendant hospital allegedly quickly and forcibly removed a post-operative drainage tube from the patient and unknowingly left a section of the tube inside the patient. The patient's wife was in the hospital room at the time of the alleged negligence and there were no genuine issues surrounding the identity of the allegedly culpable person or the events that led to the tube being left inside the patient.

17. Is a proposal for settlement valid if the amount offered is different when spelled out as compared to when referenced in numerals?

The Fourth District in *Government Employees Insurance Co. v. Ryan*, 40 Fla. L. Weekly D617 (Fla. 4th DCA March 11, 2015), found that the trial court improperly awarded attorney's fees and costs pursuant to a rejected proposal for settlement. That proposal was patently ambiguous where it spelled out "one hundred thousand dollars" in words but referred to $50,000 in numerals as the amount being offered to settle the case.

18. Who is required to address the causation issue when a motion for summary judgment is filed in a legal malpractice case?

In *Pitcher v. Zappitell*, 160 So. 3d 145 (Fla. 4th DCA 2015), the Fourth District found that the trial court erred in entering summary judgment for the defendant law firm on the basis that there was no evidence that the alleged conflict of interest in representing both surviving parents in a wrongful death action was the cause of disparate awards to each parent. The plaintiff father, as the non-movant, was not required to provide evidence establishing causation in opposition to the defendant law firm's motion for summary judgment. Furthermore, the defendant did not submit evidence establishing a lack of causation.

19. May the relevance and necessity of documents render them discoverable despite their attorney-client privileged nature?

The Fourth District in *Florida Power & Light Co. v. Hicks*, 162 So. 3d 1074 (Fla. 4th DCA 2015), determined that the trial court departed from the essential requirements of law in compelling production of attorney-client privileged documents on the basis that those documents were relevant and contained information that could not reasonably be obtained by other means. The attorney-client privilege, unlike the work product doctrine, cannot be overcome or defeated by the opposing party's showing of relevance and necessity.

20. Is a company that rents construction equipment entitled to horizontal immunity under the Workers' Compensation Act?

In *Ciceron v. Sunbelt Rentals, Inc.*, 163 So. 3d 609 (Fla. 4th DCA 2015), the Fourth District held that the trial court erred in determining that the defendant, who rented equipment for use by contractors and subcontractors at the construction site, was a subcontractor on the project entitled to horizontal immunity pursuant to section 440.10(1)(e), Florida Statutes (2010). The defendant's employees were not used during the course of construction to operate the rented scissor lifts or assist with the work the renting contractors/subcontractors were contractually-required to perform, and thus that work was not sublet to the defendant rental company for purposes of workers' compensation immunity.

FIFTH DISTRICT DECISIONS

21. Are attorney's fees imposed against an insured pursuant to section 768.79 covered under an insurance policy's "additional payments" provision?

In *Geico General Insurance Co. v. Hollingsworth*, 157 So. 3d 365 (Fla. 5th DCA 2015), the Fifth District held that the "Additional Payments" provision of the automobile liability insurance policy, which required the insurer to pay all court costs charged to the insured in a covered lawsuit, obligated the insurer to pay attorney's fees assessed against the insured pursuant to the offer of judgment statute.

22. Should a pharmacist always automatically and without question fill a doctor's written prescription?

The district court in *Oleckna v. Daytona Discount Pharmacy*, 162 So. 3d 178 (Fla. 5th DCA 2015), concluded that the trial court erred in dismissing an action alleging that the defendant pharmacy was negligent in filling prescriptions written by a physician without question on the basis that the pharmacy owed no actionable duty to the decedent. Plaintiff alleged that prescriptions were issued too closely in time and days before the decedent should have exhausted the preceding prescription, resulting in the decedent's death due to a combined drug interaction. The district court thus held that a pharmacist's duty to use due and proper care in filling a prescription extends beyond simply following the prescribing physician's directions. The court refused to find that a pharmacist's duty is satisfied "by 'robotic compliance' with the instructions of the prescribing physician."

23. May an original engineer avoid liability for negligent design plans when subsequent design plans are signed and sealed by a successor engineer?

The Fifth District in *Villanueva v. Reynolds, Smith & Hills, Inc.*, 159 So. 3d 200 (Fla. 5th DCA 2015), stated that a professional engineer may not, as a matter of law, avoid liability for negligent design plans based solely on the signing and sealing of a subsequent set of design plans by a successor professional engineer. In other words, a successor engineer's signing and sealing of design plans does not place full and exclusive responsibility for the plans on the successor engineer.

24. Is a transportation broker/logistics company liable for a commercial truck driver's alleged negligence?

In *Peninsula Logistics, Inc. v. Erb*, 159 So. 3d 301 (Fla. 5th DCA 2015), the Fifth District found that the trial court erred in directing a verdict for the plaintiffs with regard to the claim alleging that the defendant transport logistics company was vicariously liable for the negligence of an independent contractor driver's pursuant to section 316.302(1)(b), Florida Statutes. Section 316.302(1)(b) requires all owners and drivers of commercial motor vehicles that are engaged in intrastate commerce to comply with the federal rules and regulations. The pertinent federal rules and regulations only applied to "employers" defined as those who own or lease a commercial motor vehicle or assign employees to operate it. Since the defendant did not own or lease the subject tractor-trailer or assign an operator to drive it, it did not qualify as an "employer" and thus could not be held vicariously liable for the driver's negligence.

25. Does wearing high-heel shoes render a plaintiff comparatively negligent?

The Fifth District in *Bongiorno v. Americorp, Inc.*, 159 So. 3d 1027 (Fla. 5th DCA 2015), held that the trial court erred in ruling that the plaintiff was 50% comparatively negligent for her slip and fall injuries because she was wearing high heels at the time of the fall. The defendant property owner failed to sustain its burden of proving that the plaintiff had a duty not to wear shoes with four- to five-inch heels to work.