

PUBLICATION PROVIDED BY:

RISSMAN, WEISBERG, BARRETT, HURT DONAHUE & McLAIN, P.A.

201 EAST PINE STREET
15TH FLOOR
P.O. Box 4940
ORLANDO, FLORIDA 32802-4940
TELEPHONE (407) 839-0120
TELECOPIER (407) 841-9726
ORLANDO@RISSMAN.COM

TAMPA COMMONS
1 N DALE MABRY HIGHWAY
11TH FLOOR
TAMPA, FLORIDA 33609
TELEPHONE (813) 221-3114
TELECOPIER (813) 221-3033
TAMPA@RISSMAN.COM

CITRUS FINANCIAL CENTER
1717 INDIAN RIVER BOULEVARD
SUITE 201
VERO BEACH, FLORIDA 32960
TELEPHONE (772) 569-7960
TELECOPIER (772) 569-4513
VERO@RISSMAN.COM

7777 N WICKHAM ROAD, #12-417
MELBOURNE, FLORIDA 32940
TELEPHONE (321) 541-1028
TELECOPIER (321) 541-1029
MELBOURNE@RISSMAN.COM

P.O. Box 2607
FT. PIERCE, FLORIDA 34954
TELEPHONE (772) 409-1480
TELECOPIER (772) 409-1481
FTPIERCE@RISSMAN.COM

FLORIDA LAW WEEKLY

APRIL 22, 2005

1. [TORTS - SUPREME COURT REFUSED TO DETERMINE IF CAUSE OF ACTION EXISTS FOR NEGLIGENT INTERFERENCE WITH PARENTAL RIGHTS - MATTER OF FIRST IMPRESSION - SUPREME COURT REFUSED TO DETERMINE IF SUCH CAUSE OF ACTION WOULD BE SUBJECT TO MEDICAL MALPRACTICE PRE-SUIT REQUIREMENTS UNDER F.S. § 766.106](#)
2. [ATTORNEY'S FEES - INSURED'S ACTION AGAINST INSURER - GOAL OF F.S. § 627.428\(1\) IS TO AWARD ATTORNEY'S FEES AND COSTS IN ORDER TO PLACE INSURED IN THE SAME PLACE IT WOULD HAVE BEEN HAD INSURER SEASONABLY PAID CLAIM WITHOUT CAUSING UNNEEDED LITIGATION](#)
3. [CIVIL PROCEDURE - SANCTION OF DISMISSING COMPLAINT WITH PREJUDICE BASED UPON FAILURE TO COMPLY WITH DISCOVERY REQUESTS AND/OR DISCOVERY ORDERS MUST BE PREDICATED UPON EXPRESS FINDINGS DEMONSTRATING DELIBERATE DISREGARD](#)

Florida Law Weekly

April 22, 2005

Page 2

4. MEDICAL MALPRACTICE - EXPRESS AUTHORIZATION - PLAINTIFF'S PRODUCTION OF PSYCHIATRIC RECORDS ACTED AS WAIVER TO OBJECTION TO DEPOSITION OF TREATING PSYCHIATRIST'S DEPO
5. TORTS - NEGLIGENCE - SCHOOL BOARD BREACHED ITS DUTY OF CARE BY FAILING TO GIVE SUFFICIENT WARNING AND INSTRUCTION TO SUBSTITUTE TEACHER REGARDING STUDENT'S HISTORY OF AGGRESSIVE BEHAVIOR - MORTALITY TABLES ADMISSIBLE UPON SHOWING THERE IS REASONABLE PROBABILITY PERMANENT INJURY EXISTS AS PROXIMATE RESULT OF ACCIDENT
6. CIVIL PROCEDURE - ERROR TO STRIKE PLEADINGS FOR DISCOVERY VIOLATIONS WITHOUT CONDUCTING EVIDENTIARY HEARING
7. TORTS - DISCOVERY - WORK PRODUCT - REPORT PRODUCED BY TEACHER AND NOTES AND MEMORANDUM PREPARED BY SCHOOL'S PRINCIPAL REGARDING INCIDENT PROTECTED BY WORK PRODUCT DOCTRINE
8. ATTORNEY'S FEES - OFFER OF JUDGMENT - PROPOSAL FOR SETTLEMENT STRUCK ON GROUND THAT RELEASE TERMS REQUIRED BY PROPOSAL AMBIGUOUS AND NOT STATED WITH SUFFICIENT PARTICULARITY
9. CIVIL PROCEDURE - DISCOVERY - FORMER AGENCY HEAD SHOULD NOT BE COMPELLED TO TESTIFY UNLESS IT CAN BE ESTABLISHED TESTIMONY ELICITED IS NECESSARY, RELEVANT AND UNAVAILABLE FROM OTHER SOURCES

**TORTS - SUPREME COURT REFUSED TO DETERMINE IF
CAUSE OF ACTION EXISTS FOR NEGLIGENT INTERFERENCE WITH
PARENTAL RIGHTS - MATTER OF FIRST IMPRESSION - SUPREME COURT
REFUSED TO DETERMINE IF SUCH CAUSE OF ACTION WOULD BE SUBJECT
TO MEDICAL MALPRACTICE PRE-SUIT REQUIREMENTS UNDER F.S. § 766.106**

Southern Baptist Hospital of Florida, Inc. v. Welker, 30 Fla. L. Weekly S259 (Fla. April 14, 2005)

Welker filed a complaint that included a count for negligent interference with parental rights. The trial court dismissed Welker's complaint with prejudice without any elaboration regarding the reason. However, at that point Southern Baptist had never raised the failure to state a cause of action for negligent interference with parental rights.

On appeal the 1st DCA reversed the dismissal of that count, and concluded that the impact rule did not preclude the recovery of damages for emotional injuries. Although it had not been raised as an issue on appeal, the 1st DCA also concluded without elaboration that Welker's complaint had stated a cause of action against Southern Baptist for negligent interference with Welker's parental rights.

The 1st DCA certified the following question as a matter of great importance:

DOES FLORIDA'S IMPACT RULE PRECLUDE THE RECOVERY OF DAMAGES FOR EMOTIONAL INJURIES IN A NEGLIGENCE CASE ALLEGING THAT THE DEFENDANT'S ACTIONS WRONGFULLY CAUSED THE PLAINTIFF TO LOSE CUSTODY OF HIS CHILDREN AND ALL OTHER PARENTAL RIGHTS FOR A SIGNIFICANT PERIOD?

The Florida Supreme Court declined to answer the certified question because it presupposed the existence of a viable cause of action for negligent interference with parental rights. The Supreme Court previously determined in *Stone v. Wall*, 734 So. 2d 1038 (Fla. 1999) that a common law cause of action did exist for intentional interference with a custodial parent-child relationship.

The Florida Supreme Court had never been presented with the issue of whether a cause of action exists for negligent interference with parental rights. Neither party had addressed whether that cause of action actually existed in the 1st DCA. Without having been properly raised, briefed or argued, the 1st DCA improperly concluded that a cause of action for negligent interference with parental rights existed.

A determination has never been made as to whether the cause of action exists and therefore the Florida Supreme Court declined to make a determination on whether that cause of action would be subject to the presuit requirements for medical malpractice pursuant to F.S. § 766.106.

The Florida Supreme Court remanded this case so that the trial court could make a determination as to whether a cause of action exists for negligent interference with parental rights and whether such cause of action is subject to the presuit requirements of F.S. § 766.106.

**ATTORNEY'S FEES - INSURED'S ACTION
AGAINST INSURER - GOAL OF F.S. § 627.428(1) IS
TO AWARD ATTORNEY'S FEES AND COSTS IN ORDER TO PLACE
INSURED IN THE SAME PLACE IT WOULD HAVE BEEN HAD INSURER
SEASONABLY PAID CLAIM WITHOUT CAUSING UNNEEDED LITIGATION**

Travelers Indemnity Insurance Company of Illinois v. Meadows MRI, LLP, 30 Fla. L. Weekly D962 (Fla. 4th DCA April 13, 2005)

Meadows owned MRI equipment which was insured by Travelers Insurance. While the insurance policy was in full force and affect an accidental explosion in the magnet caused loss of the magnetic field. Meadows promptly filed with Travelers the notice of the loss. Travelers engaged in a lengthy four month investigation to determine whether the loss was covered. Meadows retained the services of an attorney to protect its rights and legal remedies.

Travelers ultimately acknowledged coverage and then proceeded to conduct a lengthy investigation into the amount of the loss. The estimated value of the loss by Meadows and by Travelers were very different. Travelers demanded the dispute be resolved pursuant to the appraisal provision in the insurance policy.

Before the appraisal process began, Meadows' counsel sent Travelers a letter inquiring about the procedure of the process and entitlement to attorney's fees for the prevailing party. Travelers never responded to Meadows. Meadows' attorney stated that if they did not get a response they would file a suit for declaratory judgment.

Both parties then selected appraisers so that the process could begin. While the process was ongoing Meadows filed its declaratory suit to assure that the appraisal would be governed by the Florida Arbitration Code and that the prevailing party would

be entitled to attorney's fees. After the appraisal period Travelers owed a significant balance to Meadows.

Meadows filed a motion to confirm the appraisal award in circuit court and for entry of judgment. Over objection by Travelers the circuit court judge confirmed the appraisal award. Meadows then filed its motion for entitlement to attorney's fees and costs. After hearing on the argument the trial court granted the award of attorney's fees and costs.

The 4th DCA held that the award of fees and costs to Meadows' counsel was proper. Meadows filed its suit long before the appraisal process was ever completed and showed clearly that it was not filed just for the purposes of seeking attorney's fees and costs. The trial court's award of attorney's fees and costs was consistent with section 627.428(1).

The purpose behind that section is to place Meadows in the place it would have been if Travelers had seasonably paid the claim without causing Meadows to retain counsel and incur obligations for attorney's fees. If the court were to rule to the contrary, an insured would not be made whole as it would have to apply a portion of the policy proceeds to compensate its attorneys.

**CIVIL PROCEDURE - SANCTION OF
DISMISSING COMPLAINT WITH PREJUDICE
BASED UPON FAILURE TO COMPLY WITH DISCOVERY
REQUESTS AND/OR DISCOVERY ORDERS MUST BE PREDICATED
UPON EXPRESS FINDINGS DEMONSTRATING DELIBERATE DISREGARD**

Tianvan v. Avco Corp., 30 Fla. L. Weekly D967 (Fla. 4th DCA April 13, 2005)

The trial court dismissed Tianvan's complaint with prejudice as a sanction for failing to respond to discovery requests and comply with orders compelling discovery. The trial court failed to make express written findings of fact supporting the conclusion that the failure to obey the court orders demonstrated willful or deliberate disregard.

In a per curiam opinion, the 4th DCA held that findings showing willful or deliberate disregard must be made. The 4th DCA reversed and remanded this case to the trial court in order to make written factual findings regarding willful or deliberate disregard.

**MEDICAL MALPRACTICE - EXPRESS AUTHORIZATION -
PLAINTIFF'S PRODUCTION OF PSYCHIATRIC RECORDS ACTED AS
WAIVER TO OBJECTION TO DEPOSITION OF TREATING PSYCHIATRIST'S DEPO**

Lifemark Hospitals of Florida v. Amanda Izquierdo, 30 Fla. L. Weekly D969 (Fla. 3d DCA April 13, 2005)

Lifemark Hospital of Florida, Inc. d/b/a Palmetto General Hospital, filed a writ compelling the deposition testimony of Dr. Xenia Aponte as a material witness. The lower court had denied the motion to compel that deposition.

Izquierdo is a ten-year old child born to Yolanda Gonzalez at Palmetto General Hospital. Approximately seven hours after the delivery Izquierdo sustained severe cerebral hemorrhaging which rendered her permanently and totally disabled. Gonzalez, her mother, filed suit alleging that Izquierdo was dropped by hospital staff in the hospital's baby nursery.

The hospital denied the allegations and contended that Izquierdo's condition was the result of intrauterine growth retardation. The hospital's expert testified that the condition can be caused by a mother's cocaine use during pregnancy.

Through discovery an agreed upon order was entered into expressly authorizing the release of Gonzalez's psychiatric records from North Dade Center, Inc. Gonzalez had checked herself in for treatment approximately four months after her daughter's birth. Dr. Aponte was her treating psychiatrist. The records revealed a history of polysubstance abuse including the use of marijuana throughout high school and cocaine use beginning six or seven years before the baby's birth. The last cocaine use was reported to be "one month ago." The records were silent on whether Gonzalez acknowledged cocaine use during the pregnancy.

Rule 1.280(c) of Fla. R. Civ. P. provides that a court may restrict or deny discovery "for good cause shown." Gonzalez's counsel made no showing of good cause on the record.

The 3d DCA held that it was clear from the record that Dr. Aponte was a material witness. Gonzalez had presented a history of cocaine which supports the conclusion that a possibility existed that the baby suffered from intrauterine growth retardation caused by cocaine use during pregnancy. The 3d DCA also held that in agreeing to the production of the records the plaintiff had waived any objection that they may have had on the basis of psychotherapist-patient or any other privilege.

**TORTS - NEGLIGENCE - SCHOOL BOARD BREACHED
ITS DUTY OF CARE BY FAILING TO GIVE SUFFICIENT
WARNING AND INSTRUCTION TO SUBSTITUTE TEACHER REGARDING
STUDENT'S HISTORY OF AGGRESSIVE BEHAVIOR - MORTALITY TABLES
ADMISSIBLE UPON SHOWING THERE IS REASONABLE PROBABILITY
PERMANENT INJURY EXISTS AS PROXIMATE RESULT OF ACCIDENT**

Miami-Dade County School Board v. A.N., 30 Fla. Law Weekly D973
(Fla. 3d DCA April 13, 2005)

A.N., Sr. brought this action against the Miami-Dade School Board after their son was sexually assaulted by another kindergarten student. The alleged negligence was based upon the School Board's failure to warn the child's substitute teacher of the other child's developmental and sexually aggressive behavior; failure to inform the substitute teacher of the school's bathroom pass procedure and failure to take reasonable precautions to prevent a child with a history of sexually aggressive behavior from being alone in the bathroom with their son. The jury found that the School Board was negligent and awarded past and future damages.

The School Board appealed stating that as a matter of law negligence was not established and that the trial court erred in allowing a jury instruction on mortality tables because no evidence of permanent injury was shown.

The 3d DCA held that the record in this case contained evidence that the School Board breached its duty of care. Evidence was presented that the School Board failed to give sufficient warning to the substitute teacher that the student had a history of developmental problems and sexually aggressive behavior. Evidence also showed that the substitute teacher was not instructed on the bathroom pass procedures.

The 3d DCA also held that the introduction of the mortality tables in the jury instruction was proper. In order to introduce mortality tables the burden is on the plaintiff, claiming the permanent injury, to offer evidence sufficient to raise a reasonable probability that the permanent injury exists as a proximate result of the accident which is the subject of the action.

The treating psychologist testified that the child had post traumatic stress syndrome and that it was caused by the sexual assault. The psychologist testified that the problem "might have to be revisited," "it's something that can be reactivated," "there will be times in his life where it may be an issue for him," and

Florida Law Weekly

April 22, 2005

Page 8

"based on psychological probability...it most probably will come up again."

The fact that the psychologist did not use the term "permanent problem" did not support the School Board's argument. The substance of the psychologist's testimony when considered in its entirety met the threshold of reasonable probability.

**CIVIL PROCEDURE - ERROR TO STRIKE PLEADINGS FOR
DISCOVERY VIOLATIONS WITHOUT CONDUCTING EVIDENTIARY HEARING**

TICO Insurance Company v. Schonning, 30 Fla. L. Weekly D975 (Fla. 3d DCA April 13, 2005)

The trial court struck the pleadings of TICO Insurance Company for discovery violations. The pleadings were struck in the absence of an evidentiary hearing. In a per curiam opinion, the 3d DCA reversed the trial court relying on ***Kozel v. Ostendorf***, 629 So. 2d 817, 818 (Fla. 1993) which adopted six factors that must be considered before imposing severe sanctions. There must be an evidentiary hearing before striking pleadings for discovery violations.

**TORTS - DISCOVERY - WORK PRODUCT - REPORT PRODUCED
BY TEACHER AND NOTES AND MEMORANDUM PREPARED BY SCHOOL'S
PRINCIPAL REGARDING INCIDENT PROTECTED BY WORK PRODUCT DOCTRINE**

Orange Park Christian Academy v. Russell, 30 Fla. L. Weekly D983 (Fla. 1st DCA April 15, 2005)

The daughter of Susan Russell was struck by a motor vehicle while allegedly under the supervision of Orange Park Christian Academy. The teacher at the school wrote a report on the incident and notes and memorandum were prepared by the school's principal regarding the incident. The trial court compelled disclosure of those documents.

The 1st DCA held that these documents were created in anticipation of litigation and were privileged pursuant to the work product doctrine because it was foreseeable that litigation might ensue from the incident. Additionally the teacher and principal both gave deposition testimony indicating they had contemplated litigation at the time the documents were prepared. The trial court departed from the essential requirements of law by granting the motion to compel as there was no showing that Russell needed the documents and could not obtain substantially the same information without undue hardship.

**ATTORNEY'S FEES - OFFER OF JUDGMENT - PROPOSAL FOR
SETTLEMENT STRUCK ON GROUND THAT RELEASE TERMS REQUIRED BY
PROPOSAL AMBIGUOUS AND NOT STATED WITH SUFFICIENT PARTICULARITY**

Dryden v. Pedemonti, 30 Fla. L. Weekly D992 (Fla. 5th DCA April 15, 2005)

Dryden filed a proposal for settlement which required Pedemonti to execute a full release, which was not attached to the proposal. The proposal summarized the terms of the release as:

Release of All Claims against the Defendant and all persons legally liable for the Defendant's actions in connection with the incident upon which the above styled cause of action is based, including the provision under which the Releasor shall indemnify and hold harmless the Releases as to any and all liens and subrogated interests of any third party by virtue of any services or benefits provided by the Releasor, including, but not limited to, hospital liens, doctor's liens, worker's (sic) compensation liens, CHAMPUS liens, and any other liens...

The trial court struck the proposal because it determined that the release terms required by the proposal were ambiguous and not stated with sufficient particularity. Pedemonti had argued that the release language would potentially extinguish her first party PIP and health insurance claims.

The 5th DCA affirmed the trial court's ruling and held the burden of clarifying the intent or extent of a settlement proposal cannot be placed on the party to whom the proposal is made. The 5th DCA held that the burden is upon the party offering the proposal to state its terms with sufficient particularity. The proposal was not as clear and as certain as it should have been in order to task a plaintiff with the duty to accept a proposal for settlement pursuant to the offer of judgment rule or risk the sanction of paying the defendant's attorney's fees. The 5th DCA held that by executing a general release that any subrogated claim against the tortfeasor then held or later acquired by a PIP carrier or health insurance carrier could be extinguished.

Justice Griffin concurred and stated that the problem was not so much the clarity of the release but its scope. The release included more than what the defendant would be entitled to upon a settlement of the litigation. The release required Pedemonti to indemnify and hold Dryden harmless for claims made by any lien holder or subrogated interest of any third party. The release not only included Dryden but "all persons legally liable for the defendant's actions in connection with the incident..." Justice

Griffin stated that the scope of this release would go beyond what the offerer would be entitled to by operation of law and therefore should not be enforced.

In a lengthy dissent, Justice Pleus pointed out that there are prior Florida decisions that reject the position that the release of a tortfeasor would extinguish first party PIP or health insurance claims. In *Logman v. Traveler's Insurance, Co.*, 371 So. 2d 533 (Fla. 3d DCA 1979), the 3d DCA held that the release of a party charged with liability does not have the effect of releasing an injured insured's carrier from paying medical expenses under the PIP coverage provision. The rationale of *Longman* case is that claims against a tortfeasor depend upon the tortfeasor's negligence where as first party claims against a PIP carrier are payable as a matter of contract right regardless of fault.

In *Keith v. B.E.W. Insurance Group, Inc.*, 595 So. 2d 178 (Fla. 2d DCA 1992) the same rationale was applied to first party health insurance claims holding that releasing a tortfeasor does not extinguish an injured party's claims against his or her health insurance. The 2d DCA held that the reason for this rule is based on the underlying distinction between casualty and health insurance, and that the former is triggered by negligence while the latter is a contractual right. Justice Pleus stated the argument that the instant proposal extinguished PIP and health insurance claims is not supported by release language nor by Florida case law.

Justice Pleus argued that virtually all plaintiffs that reject proposals for settlement do so because of the monetary amount being unacceptable. If the amount of money was agreeable then the plaintiff's attorney would surely contact the defendant's attorney so that the two sides could agree upon mutually acceptable release provisions. The argument of ambiguity of a release is merely used by plaintiffs to invalidate proposals after they have gambled with a jury trial and lost.

**CIVIL PROCEDURE - DISCOVERY - FORMER
AGENCY HEAD SHOULD NOT BE COMPELLED TO TESTIFY
UNLESS IT CAN BE ESTABLISHED TESTIMONY ELICITED IS
NECESSARY, RELEVANT AND UNAVAILABLE FROM OTHER SOURCES**

Horne v. School Board of Miami-Dade County, Florida, 30 Fla. L. Weekly D1002 (Fla. 1st DCA April 18, 2005)

The Florida Department of Education filed suit against the School Board of Miami-Dade County, Florida regarding the distribution of educational funding. School Board noticed and subpoenaed Mr. Horne for deposition. Mr. Horne was the former commissioner of the Florida Department of Education.

The Department of Education filed a motion for protective order and a motion to quash the subpoena based upon the rule that an agency head is immune from deposition absent the required showing. The trial court denied the Florida Department of Education's motions. The trial court reasoned that Mr. Horne was a "former" commissioner and that the rule the depositions of agency heads does not apply to his situation.

The 1st DCA disagreed and held that agency heads and other high ranking officials should not be compelled to testify unless it had been established that the testimony to be elicited is necessary, relevant, and unavailable from other sources. This rule applies equally to "former" agency heads and high ranking officials. Not only would subjecting the former officials to depositions without satisfying the necessary requirements be unduly burdensome, it could serve as a significant deterrent to qualified candidates seeking public service positions.