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**ATTORNEY'S FEES - F.S. § 57.105 -
AWARD OF ATTORNEY'S FEES TO DEFENDANT REVERSED**

Munoz v. City of Miami, 28 Fla. L. Weekly D1679 (Fla. 3d DCA July 23, 2003)

The 3d DCA reversed an award of attorney's fees in favor of the Department of Transportation against the plaintiffs pursuant to F.S. § 57.105.

Munoz claimed to have tripped on a piece of metal protruding from the sidewalk on a street. She sued a number of governmental entities including DOT. DOT denied responsibility from the start and eventually submitted an affidavit to that effect. However, Munoz did not voluntarily dismiss DOT from the lawsuit until the day after the deposition of DOT's representative, and only hours before DOT's motion for summary judgment was to be heard. DOT then sought and was awarded \$6,000 in Section 57.105 fees.

The 3d DCA agreed that the case did not justify the award of Section 57.105 fees because no governmental agency had admitted its responsibility to maintain the sidewalk at issue.

**PIP - F.S. § 627.736(1)(a) DOES NOT
PROVIDE FOR PAYMENT OF AUTOMOBILE TRAVEL EXPENSES FOR**

TRAVEL TO AND FROM MEDICAL PROVIDERS - CONFLICT CERTIFIED

Padilla v. Liberty Mutual Insurance Company, 28 Fla. L. Weekly D1679 (Fla. 3d DCA July 23, 2003)

The 3d DCA held that automobile transportation expenses are not included in the PIP statute, F.S. § 67.736(1)(a). In doing so, the 3d DCA aligned itself with the 4th DCA's opinion in ***Malu v. Security National Insurance Company***, 28 Fla. L. Weekly D1239 (Fla. 4th DCA 2003), discussed in our summary of the May 30, 2002 Florida Law Weekly.

The 3d DCA agreed with the ***Malu*** analysis that the Legislature had not specifically mentioned any type of transportation in the PIP statute other than by ambulance. The mention of one type of transportation implies the exclusion of other types.

The 3d DCA acknowledged that the 4th DCA's and its position expressly conflicted with the 5th DCA's position as set forth in ***Hunter v. Allstate Insurance Company***, 498 So. 2d 514 (Fla. 5th DCA 1986). It certified the conflict to the Florida Supreme Court.

**CIVIL PROCEDURE - DISMISSAL FOR
FAILURE TO PROSECUTE - TRANSFER OF
LIEN DOES NOT CONSTITUTE RECORD ACTIVITY**

Gregan Construction Corporation v. Friedland, 28 Fla. L. Weekly D1688 (Fla. 3d DCA July 23, 2003)

The 3d DCA affirmed an order dismissing the case for lack of prosecution. It held that transfer of an underlying mechanic's lien on the subject property to a bond pursuant to F.S. § 713.24, did not advance to litigation, and therefore, was not sufficient record activity to preclude dismissal for lack of prosecution pursuant to ***Fla. R. Civ. Pr. 1.420(e)***.

**CORPORATIONS - PIERCING CORPORATE VEIL -
TRIAL COURT IMPROPERLY PIERCED CORPORATE VEIL TO FIND
SHAREHOLDER PERSONALLY LIABLE FOR JUDGMENT AGAINST CORPORATION**

Moran v. Schurger, 28 Fla. L. Weekly D1688 (Fla. 3d DCA July 23, 2003)

The 3d DCA reversed an order which had pierced the corporate veil and found Moran personally responsible to pay a judgment to Schurger that had been obtained against Moran's corporation. The 3d DCA pointed out that the trial court had specifically found that there was no intent by Moran to defraud or mislead anyone, and that the corporation was not organized or used by Moran to mislead creditors or to perpetuate a fraud upon them.

The 3d DCA also rejected the argument that Moran was personally liable because the corporation was operated in a manner which violated F.S. § 726.106(2), which prohibit certain kinds of transfers. The 3d DCA pointed out that F.S. § 726.110(3), extinguishes claims based on F.S. § 726.106(2) unless brought within one year after the transfer was made. The record showed the

present action had been brought long after the expiration of that time period.

**LEGAL MALPRACTICE - DIRECTED VERDICT
REVERSED WHERE CONFLICTS IN EVIDENCE EXIST**

Gross v. Hodor, 28 Fla. L. Weekly D1689 (Fla. 3d DCA July 23, 2003)

There were no facts given in this case. The 3d DCA reversed a directed verdict in favor of Gross against Hodor, her former attorney, in a legal malpractice action. According to the opinion, both parties agreed that the directed verdict was improper since there were various factual issues which should have been decided by a jury. Those factual issues were not discussed in the opinion. The 3d DCA also affirmed a motion in limine precluding introduction of certain evidence, which was not discussed in the opinion.

**CIVIL PROCEDURE - COST JUDGMENT REVERSED
IN LIGHT OF REVERSAL OF UNDERLYING JUDGMENT**

Watson v. Maxim Healthcare Services, 28 Fla. L. Weekly D1696 (Fla. 4th DCA July 23, 2003)

The 4th DCA reversed a cost judgment Maxim had obtained against Watson resulting from a summary judgment in Maxim's favor. The 4th DCA had previously reversed the summary judgment in the underlying case, so it simply reversed judgment for Maxim for its costs.

**MEDICAL MALPRACTICE - EXTENSION OF STATUTE OF
LIMITATIONS PURSUANT TO F.S. § 766.104(2) - 90-DAY EXTENSION
OF STATUTE OF LIMITATIONS IS APPLIED TO END OF LIMITATIONS PERIOD**

Cortes v. Williams, 28 Fla. L. Weekly D1703 (Fla. 1st DCA July 24, 2003)

In this medical malpractice case, the 1st DCA denied the petition for writ of certiorari of Dr. Cortes which sought to review a non-final order denying his motion for summary judgment based on Williams' alleged failure to timely serve a notice of intent to initiate medical malpractice litigation pursuant to F.S. § 766.106(4).

The alleged malpractice occurred September 30, 1999. Applying the two year statute of limitations set forth in F.S. § 95.11(4)(b), the statute of limitations would have expired on September 30, 2001. However, Williams filed a petition for an automatic extension of the statute of limitations pursuant to F.S. § 766.104(2), on September 12, 2001. Dr. Cortes then received the notice of intent on December 13, 2001.

The 1st DCA ruled that pursuant to F.S. § 766.104(2), once the automatic extension of the statute of limitation is purchased, the statute of limitations becomes two years plus 90 days. Thus, when Williams purchased the extension, the statute of limitations was extended until December 29, 2001. Dr. Cortes received the notice of intent well within the limitations.

The 1st DCA then pointed out that pursuant to F.S. § 766.106, the statute of limitations is tolled during the 90-day presuit investigation. At the end of the investigation period, the claimant shall have 60 days, or the remainder of

the period of the statute of limitations, whichever is greater, within which to file suit. Since Dr. Cortes apparently failed to respond to the notice of intent, the 1st DCA held that the plaintiff had until May 12, 2002 (150 days beyond December 29, 2001) to file suit. Williams filed suit on April 25, 2002, well within the statute of limitations, as calculated by the 1st DCA.

The 1st DCA distinguished the Florida Supreme Court's decision in **Hillsborough County Hospital Authority v. Coffaro**, 829 So. 2d 862 (Fla. 2002), discussed in our summary of the October 4, 2002 Florida Law Weekly. The 1st DCA held that **Coffaro** dealt with the interplay between F.S. § 766.104(2) and F.S. § 766.106(4) in determining when a medical malpractice complaint must be filed after a notice of intent is served.

Unlike the claimant in **Coffaro**, Williams had obtained the automatic extension **before** serving the notice of intent. Thus, the 90-day tolling period and the 60-day filing periods under F.S. § 766.106(4), which had been the centerpiece of **Coffaro**, had not been triggered when Williams filed for the purchased extension. The 90-day extension purchased pursuant to F.S. § 766.104(2) by Williams should have been added to her two year limitations. The 1st DCA pointed out that **Coffaro** had also held that the 90-day extension period pursuant to Section 766.104(2) was to be tacked on to the end of the statute of limitations.

**AWARDS - COLLATERAL SOURCE SETOFF PURSUANT TO
F.S. § 768.76 - AWARD FOR PAST LOST EARNING ABILITY
SHOULD HAVE BEEN REDUCED BY AMOUNT OF SOCIAL SECURITY
DISABILITY PAYMENTS RECEIVED AS RESULT OF ACCIDENTAL INJURIES**

State Farm Mutual Automobile Insurance Company v. Gullede, 28 Fla. L. Weekly D1704 (Fla. 1st DCA July 24, 2003)

The 1st DCA held that the trial court should have reduced Gullede's damage award for past lost earning ability by the amount of Social Security disability payments she had received as a result of her accidental injuries.

The 1st DCA rejected Gullede's argument that F.S. § 768.76, the collateral source statute, was inapplicable because they had claimed loss of earning capacity, not lost wages. The 1st DCA held that a plain reading of the statute offered no support for the distinction and there was no case law supporting their argument.

**F.S. § 57.105 ATTORNEY'S FEES - WAIVER OF ABILITY TO
OBTAIN FEE AWARD JOINTLY FROM PARTY'S ATTORNEY - STATUTE
MAY CREATE CONFLICT OF INTEREST BETWEEN CLIENT AND ATTORNEY**

Kerzner v. Lerman, 28 Fla. L. Weekly D1707 (Fla. 4th DCA July 23, 2003)

The 4th DCA affirmed a fee judgment entered against Kerzner pursuant to F.S. § 57.105. The trial court had stricken as sham pleadings the complaint and amended complaint that Kerzner had filed against Lerman.

The 4th DCA rejected Kerzner's argument that the trial court erred by requiring him to be solely responsible to pay the fees and costs awarded to Lerman. He argued that pursuant to F.S. § 57.105(1), the trial court should have assessed half of the fees against his attorney.

The 4th DCA acknowledged the statute provided that fees and costs awarded pursuant to the statute will be awarded against the party and the attorney, but it noted that no such request was made in the case. Lerman's motion and her arguments before the trial court specifically sought fees against Kerzner only. Lerman also did not argue on appeal that the trial court's order was improper. The 4th DCA held that Lerman had waived her ability to seek fees jointly against Kerzner and his lawyer as contemplated by F.S. § 57.105(1).

The 4th DCA held that Kerzner had also waived this argument since there was no indication in the record that Kerzner had made it in the trial court. The 4th DCA recognized that Kerzner, as an individual, was probably not aware that his attorney would be jointly responsible for fees under the statute. However, the 4th DCA still felt the ability to challenge the order had been waived.

The 4th DCA also rejected Kerzner's argument that the trial court had erroneously included costs and fees accrued in litigating the fee issue in the amount of the total fee award. The 4th DCA affirmed because there was no transcript of the fee hearing and it was unable to identify error on the face of the record.

Finally, the 4th DCA denied Lerman's motion for appellate attorney's fees pursuant to F.S. § 57.105 since the argument presented on appeal was not of such a nature to warrant the award of appellate fees.

CAVEAT:

The 4th DCA pointed out that the language in F.S. § 57.105(1) appears to create an inherent conflict between a client and his attorney on this particular issue. A client may not know the statute allows an attorney to bear one-half of the burden of an award of fees pursuant to F.S. § 57.105. Moreover, the language provides no encouragement and no financial incentive for an attorney to advise the client that a motion may make the client and his attorney jointly liable for the payment of the fees.

The 4th DCA pointed out that an ethical duty may arise on the part of the attorney to bring the matter to the client's attention, and perhaps go as far as recommending independent counsel. The 4th DCA was confident that the Legislature was aware of this when it drafted the statute, but it still urged the Legislature to revisit and clarify the matter to avoid future litigation over such conflicts.

**FRAUD IN INDUCEMENT AND NEGLIGENT
MISREPRESENTATION - SUMMARY JUDGMENT
PRECLUDED WHERE MATERIAL ISSUE OF FACT EXISTED
AS TO WHETHER STATEMENT CONSTITUTED MISREPRESENTATION -
ECONOMIC LOSS RULE DOES NOT BAR ACTION BASED UPON FRAUD IN
INDUCEMENT - WAIVER OF RIGHT TO BRING TORT CLAIM SET FORTH
IN CONTRACT INAPPLICABLE WHERE THERE IS FRAUD IN INDUCEMENT**

D&M Jupiter, Inc. v. Friedopfer, 28 Fla. L. Weekly D1709 (Fla. 4th DCA July 23, 2003)

The 4th DCA reversed a summary judgment in favor of J.I.A., in a commercial litigation case involving fraud in the inducement and negligent misrepresentation.

This action arose out of J.I.A.'s sale of property to D&M. J.I.A. had stated in an offering memorandum that the drainage requirements for the site had

been met through a French drain retention storm sewer system which collected into the master drainage system of the Jupiter Commerce Park. D&M contended that this was a misrepresentation.

The 4th DCA agreed with D&M and ruled that whether this statement was a misrepresentation or a true statement was open to interpretation. Therefore, it was an issue of material fact precluding summary judgment.

The 4th DCA also ruled that the trial court had improperly applied the economic loss rule. In general, the economic loss rule does not bar tort actions based on fraudulent inducement or negligent misrepresentation. The test is whether the fraud alleged is in an act of performance or in a term of the bargain.

When the fraud relates to the performance of their contract, the economic loss rule will limit the parties to the contractual remedies. However, when the fraud occurs in connection with misrepresentations, statements or omissions which cause the complaining party to enter into a transaction, then it is fraud in the inducement and it survives as an independent tort.

Finally, the 4th DCA rejected J.I.A.'s argument that it was entitled to summary judgment because D&M waived its right to bring a tort claim due to "as is" language in the contract. The 4th DCA held that while a party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the constitution, such a proposition does not apply where there is an allegation of fraud. According to the 4th DCA, where there is fraudulent inducement of a contract, the fraudulent misrepresentation vitiates every part of the contract, including any "as is" clause.

**VENUE FOR UM CLAIM PROPER IN MARTIN COUNTY WHERE
ACCIDENT INVOLVING UNDERINSURED TORTFEASOR OCCURRED**

Geico General Insurance Company, Inc. v. Graci, 28 Fla. L. Weekly D1710 (Fla. 4th DCA July 23, 2003)

The 4th DCA reversed the trial court's order denying Geico's motion to transfer venue of the action to Martin County from St. Lucie County. It held that the "gravamen" of Graci's suit against Geico was to determine her entitlement to, and amount of, damages caused by an automobile accident occurring in Martin County.

Graci was a resident of St. Lucie County and her UM policy had been issued by Geico in that county. She was involved in an accident in Martin County, and she subsequently filed suit in that county against the other driver and Geico.

Graci asked the Martin County trial court to transfer venue to St. Lucie County. When that motion was denied, Graci voluntarily dismissed the action and refiled it in St. Lucie County. In support of her venue selection, she claimed that the Geico policy had been issued in St. Lucie County and had been breached there.

The trial court denied Geico's motion to transfer venue to Martin County. Geico then took a non-final appeal to the 4th DCA.

The 4th DCA rejected Graci's argument that her claim against Geico was actually one for breach of contract and that the breach had accrued in St. Lucie

County. The 4th DCA held that while Graci's action against Geico was an action on the insurance contract, it was not an action for breach of that contract. Instead, it was an action filed pursuant to the contract. cursory examination of the complaint revealed its purpose was to determine the amount of compensatory damages, if any, to which Graci was entitled under the policy. Thus, the action was the same as that which Graci had against the underinsured third party tortfeasor seeking damages for bodily injury.

Consequently, the 4th DCA ruled that the cause of action against Geico and the underinsured third party tortfeasor accrued in Martin County and that the case should properly be venued in that county.

**CERTIORARI REVIEW OF DISCOVERY
ORDERS - COMPLIANCE WITH DISCOVERY ORDER AND
FAILURE TO APPEAL THAT ORDER CONSTITUTED WAIVER OF
ABILITY TO SEEK CERTIORARI REVIEW - ORDER COMPELLING
DISCOVERY OF ITEM DEPARTED FROM ESSENTIAL REQUIREMENTS OF
LAW EVEN THOUGH ITEM HAD BEEN PRODUCED TO OTHER PARTIES IN CASE**

The International Bank of Miami, N.A. v. Shinitzky, 28 Fla. L. Weekly D1711 (4th DCA July 23, 2003)

The 4th DCA granted in part and denied in part a petition for writ of certiorari by the International Bank concerning a discovery order requiring the bank to produce a suspicious activity report (SAR) to Fleet National Bank in a lawsuit involving claims of investment fraud, conspiracy, and civil theft.

An SAR is a document generated by a bank, as mandated by Federal law, to report any suspicious transaction relevant to a possible violation of banking laws or regulations. In February 2001, the trial court had granted, over International Bank's objection, one plaintiff's motion to compel production of the SAR prepared by International Bank pertinent to the account of Boston Investment Holdings.

The order provided the SAR was to be kept confidential and that its contents were not to be disclosed to anyone associated with Boston Investment Holdings or any other defendant, including Fleet National Bank, without further order of the trial court. International Bank produced the SAR in compliance with the order and did not seek appellate review.

In October 2002, the trial court granted Fleet's motion to compel production of the same SAR. This order contained the same confidentiality provisions as the February 2001 order.

International Bank then filed a motion to vacate the February 1, 2001 and October 2, 2002 orders alleging that Federal law and regulations prohibited the disclosure of SAR's or their content even in the context of discovery in a civil lawsuit. The trial court denied the motion and International Bank sought certiorari review.

The 4th DCA first denied International Bank's petition with regard to the February 2001 order. It held that International Bank had waived any objection to that order because it had fully complied with it and failed to seek its appellate review.

However, the 4th DCA granted the petition with regard to the October 2002 order. It found that International Bank had shown the two elements necessary for

certiorari review, namely irreparable harm and departure from the essential requirements of the law.

The 4th DCA found that there was irreparable harm with regard to the October 2, 2002 order even though the SAR had been produced to nine other parties in the lawsuit. The 4th DCA characterized this as the cat being half in and half out of the bag. However, the irreparable harm shown involved the danger to the life of a bank employee who had generated the report and the potential loss of customers if SAR's are deemed discoverable in civil litigation.

The next inquiry was whether the trial court had departed from the essential requirements of the law. The 4th DCA examined Federal banking statutes and case law and concluded that SAR's should not be produced in civil litigation. Thus, it ruled that the trial court had departed from the essential requirements of the law with regard to the October 2002 order.

Since the SAR had already been disclosed to nine other parties, the 4th DCA cautioned the trial court regarding any further disclosures, including the use of the SAR in pre-trial, trial, or post-trial proceedings.

**TORTS - REAR-END COLLISION -
ADDITUR INAPPROPRIATE WHERE JURY'S AWARD
OF PAST MEDICAL EXPENSES CONSISTENT WITH SHARPLY
CONFLICTING EVIDENCE REGARDING NATURE AND EXTENT OF
PLAINTIFF'S INJURIES - PLAINTIFF ENTITLED TO DIRECTED
VERDICT ON LIABILITY WHERE DEFENDANT FAILED TO REBUT
PRESUMPTION OF NEGLIGENCE THAT ARISES IN REAR-END COLLISIONS**

Ortlieb v. Butts, 28 Fla. L. Weekly D1715 (Fla. 4th DCA July 23, 2003)

The 4th DCA ruled that the trial court had improperly granted a motion for additur post-trial. The trial court had also improperly failed to grant the motion of the plaintiff, Butts, for directed verdict on liability. It ruled that defendant, Ortlieb, had failed to rebut the presumption of negligence that arises in a rear-end collision.

Butts had claimed \$21,244.74 in total medical bills at trial. \$7,347 were attributed to a purported TMJ injury. The jury awarded Butts \$10,000 in past medical expenses and determined that she had not sustained a permanent injury as a result of the accident. It awarded no future damages.

The trial court granted Butts' post-trial motion for additur. It increased the award of past medical expenses to \$21,000, ruling that the jury had inappropriately failed to consider un rebutted evidence as to the medical expenses.

The 4th DCA reversed the trial court's additur. The 4th DCA acknowledged that where there is undisputed evidence supporting an award of damages and the jury fails to make such an award, it is error for the trial court to deny a motion for additur. On the other hand, where the evidence is conflicting and the jury could have reached its verdict in a manner consistent with the evidence, it is error for the trial court to veto the jury verdict by granting a motion for additur.

Here, defense had presented two medical experts concerning Butts' medical claim. An orthopedic surgeon testified that there was no objective indication that Butts had been injured in the accident or that she had suffered any permanent injury. A dentist testified that Butts' problems with her jaw and

teeth were not TMJ caused by the accident, but was the result of missing teeth, misalignment, a developmental defect in her bite, habitual tooth grinding, and sinus disease.

The 4th DCA held that the jury's award of past medical expenses was consistent with the sharply conflicting evidence on the nature and extent of Butts' injuries. For example, the jury could have concluded that Butts' jaw problems were not caused by the accident, but were the result of other conditions. Thus, \$7,347 attributable to the TMJ treatment would not have been included in the damage award.

On cross-appeal, the 4th DCA agreed with Butts that the trial court should have granted her motion for directed verdict on the issue of liability because Ortlieb had failed to rebut the presumption of negligence that arises from a rear-end collision. The accident had occurred at a stop sign. Butts had stopped at the stop sign and Ortlieb had pulled behind her. Butts proceeded to go through the stop sign, and Ortlieb pulled up to the white stop bar. Ortlieb turned her head to the left to view oncoming traffic, and when it cleared, Ortlieb put her foot on the gas and accelerated. She instantly hit Butts, who had not fully entered the street.

Ortlieb admitted on cross-examination that she had only observed Butts pulling forward enough to allow her to move her car forward. From that point on, Ortlieb's head was turned to the left. She had put her foot on the gas and accelerated without confirming that Butts had entered the street. Ortlieb conceded that she did not know, and did not see, that Butts was still ahead of her also waiting for traffic to clear.

The 4th DCA held that Butts' stop was not sudden and unexpected. Ortlieb conceded that she never saw Butts because she was not looking. The 4th DCA cited its opinion in *Ferguson v. Disalvo*, 775 So. 2d 414 (Fla. 4th DCA 2001), where it held that presumption of negligence is not rebutted in a rear-end collision where the lead vehicle suddenly stops, but the stop happens at a place and time where it was reasonably expected.

**AGENCY RELATIONSHIP - FRANCHISES -
SUMMARY JUDGMENT FOR FRANCHISOR REVERSED -
FRANCHISE AGREEMENT CREATED ISSUE OF MATERIAL FACT AS
TO WHETHER FRANCHISOR EXERCISED SUFFICIENT CONTROL OVER
FRANCHISEE TO MAKE FRANCHISEE ACTUAL AGENT OF FRANCHISOR**

Font v. Stanley Steemer International, Inc., 28 Fla. L. Weekly D1719 (Fla. 5th DCA July 25, 2003)

The 5th DCA reversed a summary judgment in favor of Stanley Steemer. It agreed with Font's argument that whether Stanley Steemer's franchisee and its employees were actual agents of Stanley Steemer at the time of the accident was an issue of fact not appropriate for resolution by summary judgment.

The accident arose out of a motor vehicle accident in which Font's husband was killed. Font's car collided with a van owned by Gellner Enterprises and operated by Gellner's employee, O'Connor, in the course and scope of his employment. Gellner owned and operated a Stanley Steemer franchise. The van was used in the cleaning business and had been painted in the distinctive Stanley Steemer colors. The van did not indicate that the franchise was independently owned.

Font filed a wrongful death suit against Gellner Enterprises, O'Connor and Stanley Steemer. She alleged that Gellner and O'Connor were actual and apparent agents of Stanley Steemer. The trial court granted Stanley Steemer's motion for summary judgment.

On appeal, Font challenged only the determination as to actual agency. The 5th DCA determined that there is no "bright line" for determining when the requirements and restrictions in a franchise agreement render the franchisee an agent of the franchisor. Because of the multitude of facts which must be examined to determine the nature of the parties' relationship, the 5th DCA was unable to say, as a matter of law, that Gellner Enterprises was not an agent of Stanley Steemer.

The 5th DCA held that the existence of an agency relationship is normally one for the trier of fact to decide. The essential elements of an actual agency relationship are: (1) acknowledgement by the principal that the agent will act for him or her; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent.

The 5th DCA held that applying the "control" test to a franchise is not an easy task. A franchise clearly has an independent aspect to it, but a franchisor must by necessity retain some control over the use of its names, goods or services.

The 5th DCA pointed out that while the franchise agreement expressly provided that Gellner was an independent contractor and not the agent or employee of Stanley Steemer, the nature of the parties' relationship is not determined by the descriptive labels employed by the parties themselves. Instead, the relationship depends in each case on the nature and extent of the franchisor's control as defined in the agreement or by the actual practice of the parties.

The 5th DCA's opinion recounted in detail the aspects of the franchise agreement which raised questions as to the amount of control Stanley Steemer had over Gellner Enterprise's business. For example, Stanley Steemer had to approve all advertising in advance and required Gellner Enterprises to contribute to advertising on a national basis. Gellner Enterprises was required to clean carpets and upholstery only with patented Stanley Steemer carpet cleaning machines and cleaning products. It had to strictly adhere to Stanley Steemer's method of cleaning, and it had to purchase at least one of the most recent Stanley Steemer carpet cleaning machines.

**NURSING HOMES - ARBITRATION CLAUSE IN CONTRACT
UNENFORCEABLE - WHERE ARBITRATION CLAUSE CALLS FOR
ARBITRATION TO TAKE PLACE IN FOREIGN JURISDICTION, FLORIDA
COURTS CANNOT COMPEL ARBITRATION WHERE ONE PARTY OBJECTS**

Northport Health Services v. Raidoja, 28 Fla. L. Weekly D1721 (Fla. 5th DCA July 25, 2003)

The 5th DCA affirmed an order denying the motion of Northport Health Services, a nursing home, to abate and compel arbitration. Northport had sought

arbitration pursuant to an arbitration provision in the admission agreement between the nursing home and the decedent.

The 5th DCA agreed with the circuit court that the arbitration provision was not enforceable because the agreement required arbitration to occur in Tuscaloosa County, Alabama. Florida law clearly holds that if an arbitration clause calls for arbitration to take place in a foreign jurisdiction, Florida courts cannot compel arbitration if one of the parties objects.

**VERDICT INCONSISTENT WHERE IT FOUND LIABILITY FOR
BREACH OF CONTRACT, BUT AWARDED NO DAMAGES - INCONSISTENT
VERDICT REQUIRED NEW TRIAL ON ALL ISSUES, NOT JUST ON DAMAGES**

MSM Golf, L.L.C. v. Newgent, 28 Fla. L. Weekly D1726 (Fla. 5th DCA July 25, 2003)

The 5th DCA ordered a new trial on all issues in a breach of contract action where the jury had found for the plaintiff, MSM Golf, on liability, but had not awarded any damages. The trial court had denied MSM's motion because it had only asked for a new trial on damages and/or an additur. The 5th DCA held that because the jury verdict had been inconsistent, a new trial was warranted on both liability and damages.

MSM sued Newgent for breach of two contracts. The jury returned a verdict finding that Newgent had breached both contracts, but it failed to award any damages to MSM on either breach. Although this was an inconsistent verdict, apparently neither party objected to the verdict before the discharge of the jury. In a footnote, the 5th DCA wrote that the issue of whether the aggrieved party is obligated to object to the verdict prior to the discharge of the jury was not raised on appeal.

MSM moved for a new trial on the issue of damages only. In the alternative, it requested an additur. The trial court denied the motion for a new trial, despite finding that the verdict was inconsistent. The trial court's rationale was that MSM had sought a new trial only on damages, and not on both liability and damages. The 5th DCA pointed out, though, that MSM had indicated at the hearing that it would request a new trial on all issues rather than accept a verdict for zero damages.

The 5th DCA ruled that once the trial court had specifically recognized the patent inconsistency of the verdict, it was obligated to order a new trial. The fact that MSM had only asked for a new trial on damages should not have been a limiting factor, particularly where the trial court had concluded that a new trial on damages alone was not justified and that MSM had orally acknowledged that it would move for a new trial on all issues rather than risk having no retrial at all.

**VERDICTS - TWO ISSUE RULE - CLAIMS OF ERROR AS TO
PARTICULAR LIABILITY THEORY COULD NOT BE BASIS FOR
REVERSAL WHERE OTHER LEGAL THEORIES OF LIABILITY WERE
PRESENTED TO JURY THAT MAY HAVE BEEN BASIS FOR ITS VERDICT**

Marriott International, Inc. v. Perez-Melendez, 28 Fla. L. Weekly D1727 (Fla. 5th DCA July 25, 2003)

The 5th DCA affirmed a final judgment against Marriott in a premises liability case. The jury's verdict was supported by the two-issue rule.

Perez-Melendez had made reservations to attend a conference at Marriott World Center. However, when she arrived, the hotel did not have a room for her. She was given accommodations in the Residence Inn, also owned by Marriott, adjacent to the World Center.

Ms. Perez-Melendez was injured one evening as she was walking from the Residence Inn to the World Center. She stepped into a drainage inlet and fractured her ankle.

Ms. Perez-Melendez's one count complaint against Marriott alleged four separate theories of liability. The first was that Marriott was negligent for failing to provide a reasonably safe transportation system for Perez-Melendez between the two hotels. The other three were premises liability theories based on the alleged failure to maintain the premises in reasonably safe condition, failure to correct a dangerous condition that Marriott knew or should have known about, and failure to warn Perez-Melendez of an existing dangerous condition in which Marriott knew or should have known.

Marriott moved for directed verdict alleging that Perez-Melendez had failed to establish a prima facie case of negligence. The trial court denied the motions for directed verdict. The jury was instructed on each theory of liability, but the verdict form did not request findings as to each liability theory. Thus, it simply requested the jury to determine whether Marriott was negligent, and if so, the amount of damages. The verdict form was submitted to the jury without objection.

Marriott primarily argued on appeal that Perez-Melendez had failed to establish that Marriott owed Perez-Melendez a duty to provide her with a reasonably safe transportation system. The 5th DCA ruled, though, that it could not tell from the general verdict whether this was the theory on which the jury based its liability verdict. The jury was instructed on each of the four theories of liability and the partys' respective closing arguments addressed each theory of liability. **Implicit** in the 5th DCA's ruling was that Marriott should have objected to the general verdict form and requested a verdict which required the jury to find as to each theory of liability.

The 5th DCA also held that there was sufficient evidence on the three premises liability theories to support the jury's verdict. This included photographs and a videotape of the scene where Perez-Melendez fell and the testimony of Perez-Melendez's experts regarding the dangerous condition of the drain inlet.

CAVEAT:

This case illustrates why a defendant must carefully consider the form of verdict given to the jury. The 5th DCA **implied** that it would have been willing to consider Marriott's argument that it did not have a duty to provide transportation to Perez-Melendez. However, it could not do so because it could not determine from the general verdict whether this was the theory of liability upon which the jury had predicated its verdict.

The 5th DCA implied that in order to have preserved this issue for appeal, Marriott should not have agreed to a general verdict, but instead should have requested a verdict which required the jury to determine whether Marriott was liable under **each** liability theory.

The most frequent situation where this problem arises concerns proximate cause. General verdict questions concerning liability combine the questions of negligence and proximate cause. A defendant should consider whether to submit a verdict which breaks the general question into two questions: first, whether there was negligence on the part of the defendant; and second, if so, whether that negligence was the proximate cause of the plaintiff's injuries and damages.

Please note, though, that this analysis needs to be undertaken on a case by case basis because under the circumstances of a particular case, the two-issue rule may be advantageous for the defense.

**WRONGFUL DISCHARGE - SUMMARY JUDGMENT
FOR EMPLOYER IMPROPER - ISSUE OF MATERIAL
FACT EXISTED AS TO WHETHER TERMINATION OF EMPLOYEE
WAS DUE TO RETALIATION FOR FILING WORKERS' COMPENSATION
CLAIM OR DUE TO EMPLOYEE'S VIOLATION OF ADMINISTRATIVE RULE**

Hodges v. Citrus World, Inc., 28 Fla. L. Weekly D1733 (Fla. 2d DCA July 25, 2003)

The 2d DCA reversed a summary judgment in favor of Citrus World in a lawsuit brought by Hodges claiming that Citrus World had wrongfully discharged her from her employment in retaliation for seeking workers' compensation benefits for a work related injury. An issue of material fact existed as to whether Hodges' discharge was in retaliation for her workers' compensation claim or for violation of Citrus World's administrative rule requiring her to return to work within three days after being discharged by her physician.

Hodges was injured in an accident while employed by Citrus World. Citrus World had an administrative rule requiring its injured employees to contact the company and to return to work within three days of being released by their physicians. Hodges claimed that she was unaware that she had been released by her physician to return to light duty work until she had received her physicians' return to work form on April 24, 2001, the date she attempted to resume her employment.

Hodges testified in her deposition that when she met with Citrus World regarding the end of her employment, Citrus World never referred to her current workers' compensation claim, and she was told that her termination was based on her violation of the three day rule. Citrus World moved for summary judgment, arguing that Hodges had admitted that her discharge did not result from retaliation, but from Hodges' own violation of the three day return to work rule.

Hodges filed affidavits in opposition to the motion stating that the reason she was given for her discharge was pretextual. The 2d DCA also pointed out that Hodges had never admitted that Citrus World's proffered reason was the true reason for her termination.

The 2d DCA reversed the summary judgment entered in favor of Citrus World. It found that there were issues of material fact concerning the reason for Hodges' termination.

**CIVIL PROCEDURE - DISCOVERY - DEFENDANT ENTITLED
TO PRODUCTION OF PHOTOGRAPHS OF ACCIDENT SCENE, EVEN
THOUGH PHOTOGRAPHS PROTECTED BY WORK PRODUCT PRIVILEGE WHERE**

DEFENDANT UNABLE TO OBTAIN SUBSTANTIAL EQUIVALENT BY OTHER MEANS

Florida Power Corporation v. Dunn, 28 Fla. L. Weekly D1735 (Fla. 2d DCA July 25, 2003)

No facts were given in this opinion, but it appears that Florida Power sought photographs that were in the plaintiff's possession. The plaintiff apparently had asserted the work product privilege with regard to the photographs. The 2d DCA ruled that Florida Power was entitled to the production of photographs of the accident scene as it existed at the time of the accident, even though those photographs constituted work product.

Florida Power had shown that it was unable to obtain the substantial equivalent of the photographs by other means. However, there apparently were other photographs which were not of the accident scene. The 2d DCA ruled that Florida Power was not entitled to the production of those photographs.

**CIVIL RIGHTS - 42 U.S.C. § 1983 -
POLICE OFFICER ENTITLED TO SUMMARY JUDGMENT
ON § 1983 CLAIM - POLICE OFFICER HAD QUALIFIED
IMMUNITY BECAUSE HE HAD PROBABLE CAUSE TO ARREST PLAINTIFF**

Esposito v. Williamson, 28 Fla. L. Weekly D1735 (Fla. 2d DCA July 25, 2003)

The 2d DCA ruled that a city police officer was entitled to a summary judgment in a civil rights case pursuant to 42 U.S.C. Section 1983. The 2d DCA found that the police officer was entitled to qualified immunity, shielding him from personal liability under Section 1983.

Williamson claimed that Esposito had arrested him without probable cause in violation of his Fourth Amendment rights to be free from an unlawful arrest without probable cause. The 2d DCA said the undisputed material facts showed that an eyewitness had reported a crime to Esposito and had positively identified Williamson as the perpetrator. The 2d DCA held that a reasonable officer in the same circumstances as Esposito could have believed that probable cause existed. The level of certainty necessary for a finding of probable cause is much lower than that needed for a conviction on the underlying crime.

The 2d DCA rejected Williamson's argument that Esposito had failed to investigate Williamson's alibi before making the arrest. a police officer is not required to investigate a defendant's alibi before making their probable cause determination.

The 2d DCA concluded that the undisputed facts required the application of the qualified immunity defense because the existence of probable cause is an absolute bar to a Section 1983 claim.

**ATTORNEY'S FEES - CIRCUIT COURT HAS
NO AUTHORITY TO AWARD APPELLATE ATTORNEY'S
FEES WITHOUT AUTHORIZATION FROM APPELLATE COURT**

Closuit v. Crane Environmental, Inc., 28 Fla. L. Weekly D1736 (Fla. 2d DCA July 25, 2003)

The 2d DCA affirmed in part and reversed in part a fee judgment against the defendants entered for discovery violations. The portion of the fee judgment

reversed pertained to the time spent by Crane Environmental's counsel responding to a petition for a writ of certiorari by Closuit. Although the 2d DCA had denied Closuit's petition, Crane had not filed a motion for attorney's fees during the pendency of that appeal with the 2d DCA.

The trial court was aware that Crane had not filed a motion for appellate fees with the 2d DCA, but had awarded those fees anyway as a deterrent and as a sanction. The 2d DCA held, though, that the appellate court has not authorized the award of appellate fees, the circuit court has no authority to award those fees, even as a sanction.

**SUMMARY JUDGMENT FOR COMPANY
RETAINED BY INSURER TO INSPECT INSURED
PROPERTY TO VERIFY COVERAGE AND INSURABILITY
OF PROPERTY REVERSED - DEFENDANT HAD NEGLIGENTLY
INSPECTED WRONG PROPERTY AND FAILED TO REPORT THAT
INSURED PREMISES INCLUDED A NIGHT CLUB WHICH WOULD
HAVE BEEN A PROHIBITED RISK - ISSUE OF MATERIAL FACT AS
TO WHETHER PROPERTY OWNER INTENTIONALLY MISREPRESENTED
PRESENCE OF NIGHT CLUB ON PROPERTY AND WHETHER INSURER
RELIED UPON DEFENDANT'S INSPECTION REPORT IN ISSUING POLICY**

Gainsco v. ECS/Choicepoint Services, Inc., 28 Fla. L. Weekly D1744 (Fla. 1st DCA July 28, 2003)

The 1st DCA reversed a summary judgment for ECS in an action by Gainsco to recover insurance proceeds it had paid to Stringfellow as a result of a fire. It held that an issue of material fact existed as to whether Gainsco's payment to Stringfellow had been voluntary or as a result of ECS's alleged negligent inspection of Stringfellow's premises.

Stringfellow had obtained a property insurance policy from Gainsco. Gainsco hired ECS to inspect the property and to verify its coverage and insurability. Gainsco alleged that ECS had negligently inspected the wrong property, and consequently failed to report that the insured premises included a night club serving alcoholic beverages. Gainsco claimed that the night club business was a prohibited risk for which coverage would not have been provided under its underwriting guidelines, and that Gainsco had relied on ECS's erroneous inspection report in maintaining coverage under the policy.

Stringfellow's property was destroyed by fire. Gainsco subsequently paid Stringfellow \$400,000 to cover the loss. Gainsco then filed a complaint seeking reimbursement from ECS based upon its alleged negligence.

The trial court entered summary judgment for ECS finding that Gainsco had paid Stringfellow voluntarily. It had determined that Stringfellow had failed to list the night club as one of the businesses occupying the insured building and that Gainsco would not have issued the policy if the night club had been listed in the application.

The trial court concluded that Gainsco could have avoided payment pursuant to Section 627.409(1), **Florida Statutes**, which provides that an insured's omission or misrepresentation of a material fact is an absolute defense to coverage. Because Gainsco had failed to avail itself of this defense, it had voluntarily paid Stringfellow and could not seek reimbursement from ECS.

The 1st DCA held that summary judgment was improper because language in the insurance policy controlled over the provisions of Section 627.409(1). According to the opinion, express language in the policy voided coverage for a material misrepresentation or omission only if the insured **intentionally** concealed or misrepresented a material fact in procuring the insurance. By contrast, Section 627.409(1) does not require an intentional misrepresentation of omission to void coverage. The 1st DCA held that parties may alter statutory terms by their agreement so long as public policy is not contravened.

The 1st DCA ruled that there was no finding by the trial court and nothing in the record that directly or indirectly indicated the existence of fraud or intentional misrepresentation by String-fellow. Gainsco had also presented evidence by deposition and affidavit that listing the night club by its business name only, without a description of the activities carried on by the business, would not have led Gainsco to determine that the night club was a prohibited risk.

Additionally, Gainsco's underwriting vice president testified that after an inspection report is received, the company no longer relies on the policy application. Rather, the company relies on the inspection report to determine whether to insure the property, or to cancel the policy already issued.

The 1st DCA held that the foregoing created material issues of fact precluding summary judgment for ECS.

JLH:HWJ:pas