

**RISSMAN, BARRETT, HURT,
DONAHUE & McLAIN, P. A.
ATTORNEYS AT LAW**

STEVEN A. RISSMAN
ROBERT C. BARRETT
JENNINGS L. HURT III
ROBERT A. DONAHUE
JOHN E. McLAIN III
RICHARD S. WOMBLE
JOHN P. DALY
STACIE B. GREENE
THEODORE N. GOLDSTEIN
RAYMOND A. LOPEZ
VANCE R. DAWSON
RICHARD B. MANGAN JR.
HENRY W. JEWETT II
DANIEL M. POLLACK
ART C. YOUNG
NICOLE D. RUOCCO
DANIEL T. JAFFE
BEATRIZ E. JUSTIN
J. GREGORY GIANNUZZI
DAVID K. BEACH
F. DEAN HEWITT
EDWARD M. COPELAND IV
DAVID R. KUHN
G. WILLIAM LAZENBY IV
R. CLIFTON ACORD II
ROBERT D. BARTELS
JILL M. SPEARS
JEFFREY J. KERLEY
KARISSA L. OWENS

OF COUNSEL
ROBERT J. JACK
EXECUTIVE DIRECTOR
W. SCOTT PETERSON

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

207 S. 2nd STREET
FT. PIERCE, FLORIDA 34950
TELEPHONE (772) 409-1480
TELECOPIER (772) 409-1481
FTPIERCE@RISSMAN.COM

WWW.RISSMAN.COM

PLEASE REPLY TO: ORLANDO

AMY L. BAKER
SEAN M. CROCKER
CHRISTOPHER E. DENNIS
SARAH E. EGAN
JAMES E. FAVERO III
JOSHUA T. FRICK
SUSAN R. FULLER
PAUL B. FULMER
JANNINE C. GALVEZ
ELISE J. GEIBEL
CHRISTOPHER A. HANSON
VICTORIA S. LUNA
LAURA F. LYTLE
DARIEN M. MCMILLAN
ERIC F. OCHOTORENA
JEREMY T. PALMA
JEFFREY M. PATNEAUDE
WENDY L. PEPPER
D. BLAKE REHBERG
KELLEY A. RICHARDS
JUAN A. RUIZ
BRYAN R. SNYDER
LARRY D. SPENCER
MEREDITH M. STEPHENS
ELIZABETH M. STUART
F. PAUL TIPTON
NICOLETTE E. TSAMBIS
JASON R. URBANOWICZ
CHRISTINE V. ZHAROVA

FLORIDA LAW WEEKLY

MAY 6, 2011

**MEDICAL MALPRACTICE - PRESUIT REQUIREMENTS - DISTRICT
COURT EXCEEDED ITS AUTHORITY - EXPERT WITNESS' QUALIFICATIONS**

Williams v. Oken, 36 Fla. L. Weekly S202 (Fla. Sup. Ct. May 5, 2011)

The Florida Supreme Court quashed the 1st DCA's decision to review evidence presented challenging compliance with presuit requirements. The Florida Supreme Court decided to uphold the 4th DCA's ruling in *St. Mary's Hosp. v. Bell*, 785 So. 2d 1261 (Fla. 4th DCA 2001), where the 4th DCA held that authority does not lie with the appellate courts to reweigh the evidence presented concerning compliance with presuit requirements.

Mr. Williams brought an action against Dr. Oken and the Mayo Clinic of Jacksonville, alleging that Dr. Oken was negligent in diagnosing Mr. Williams with an acute myocardial infarction. Mr. Williams alleged that Dr. Oken was negligent in misrepresenting his EKG results, failing to admit him to the hospital, failing to

conduct a full workup and for later recommending that he take Maalox when his symptoms worsened.

Mr. Williams served his notice of intent to litigate and the corroborating affidavit and curriculum vitae of Dr. Foster. Dr. Foster was Board Certified in emergency room and family medicine, but not in cardiology. Dr. Oken filed a motion to dismiss alleging that Mr. Williams had failed to comply with statutory presuit requirements. The trial court denied Dr. Oken's motion. He appealed to the 1st DCA who granted review on the issue and quashed the trial court's denial of Dr. Oken's motion to dismiss.

The Florida Supreme Court held that for the 1st DCA to have authority to review the evidentiary issues concerning compliance with presuit requirements it would have to show that the trial court abused their discretion in some manner. The Florida Supreme Court found that without an abuse of discretion the ability to weigh the evidence in determining compliance with presuit requirements rests with the trial court. It then upheld the 4th DCA's decision in *St. Mary's* that review of evidentiary compliance with presuit requirements rests with the trial court and is not a matter for appellate review.

The Florida Supreme Court found that the 1st DCA did have authority to review the case's procedural presuit requirements. However, they did not have the authority to review whether Dr. Foster was a qualified expert.

JURORS - PEREMPTORY CHALLENGES - GENDER DISCRIMINATION

Sabine v. State of Florida, 36 Fla. L. Weekly D874 (Fla. 2d DCA April 27, 2011)

The 2d DCA found that the trial court committed reversible error when it did not require the State to provide a gender-neutral reason for its peremptory strike of a male panelist. In ***Melbourne v. State***, 679 So. 2d 759 (Fla. 1996), the Florida Supreme Court established guidelines that must be followed when there is an allegation of a discriminatory strike. The Florida Supreme Court held that a court does not look at the grounds for

the objection, but instead looks to see whether the proper procedure had been followed. No facts were provided for this case.

CRIMINAL LAW - UNSUPERVISED CONTACT WITH THE JURY

Natan v. State of Florida, 36 Fla. L. Weekly D878 (Fla. 2d DCA April 27, 2011)

The 2d DCA found reversible error had occurred when a piece of evidence had been sent back with the jury during deliberations with an extra tag on it. The bailiff then brought the evidence to the courtroom, showed it to the assistant state attorney and advised him "that he had taken care of the situation, the assistant state attorney had some help, and not to bring it up." The Florida Supreme Court found that reversible error occurred when the bailiff had unsupervised communication with the jury. Based on the comments made to the assistant state attorney, reversible error had occurred and a new trial was required. No facts were provided for this case.

**CIVIL PROCEDURE - DISCOVERY
INTO ATTORNEY'S FEES BEFORE A JUDGMENT HAD BEEN ENTERED**

Delmonico v. Crespo, 36 Fla. L. Weekly D889 (Fla. 4th DCA April 27, 2011)

The 4th DCA quashed a trial court's order denying a request for a protective order as to the amount of attorney's fees. The 4th DCA found that a judgment must be entered against a party before discovery can be allowed to determine the amount of attorney's fees. No facts were provided for this case.

INSURANCE - AN INSURED CANNOT

RECOVER FROM A POLICY ON A VEHICLE NOT IN SUBJECT ACCIDENT

Swan v. State Farm Mutual Auto. Ins. Co., 36 Fla. L. Weekly D894
(Fla. 3d DCA April 27, 2011)

The 3d DCA affirmed the trial court's decision granting summary judgment in favor of State Farm Mutual Automobile Insurance Co. The 3d DCA held that since the Swans had not paid the premiums on their second uninsured motorist policy, they could not now seek to stack onto that policy.

Kathleen Swan as personal representative of the estate and survivors of Alan Swan Senior and Mary Jo Swan, appealed the trial court's order granting summary judgment in favor of State Farm. The Swans were involved in a car accident with an uninsured motorist, which led to the death of Alan Swan and to the serious bodily injury of Mary Jo Swan. Kathleen Swan attempted to stack two uninsured motorist policies for two separate vehicles together when only one of the vehicles were involved in the subject accident.

The 3d DCA found that since the Swans had failed to pay the uninsured motorist premiums on the second vehicle, and had in fact expressly rejected coverage on that vehicle, they could not now attempt to stack the two policies.

RBM/CQD/smm/tsr