# TERRY'S TAKES

**Your Weekly Florida Federal and State Appellate Caselaw Update for Personal Injury Lawyers**

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### Anti-Lawyer Bill

HB 837 on Civil Remedies was filed by Representatives Gregory and Fabricio. The bill proposes statutory changes as follows:

- Changes Florida's comparative negligence system from a "pure" comparative negligence system to a "modified" comparative negligence system, so that a plaintiff who is more at fault for his or her own injuries than the defendant may not recover damages from the defendant.
- Provides uniform standards to assist juries in calculating the accurate value of medical damages in personal injury or wrongful death actions.
- Modifies Florida's "bad faith" framework to:
  o Require a claimant to notify an insurer that the claimant intends to bring a bad faith action in all bad faith cases.
  o Allow an insurer 60 days to pay the claimant damages or correct the circumstances giving rise to the alleged violation, thereby avoiding bad faith liability.
  o Clarify that negligence alone is not enough to demonstrate bad faith.
  o Require a claimant to act in good faith with respect to furnishing information, making demands, setting deadlines, and attempting to settle the insurance claim.
  o Allow an insurer, when there are multiple claimants in a single action, to limit the insurer's bad faith liability by paying the total amount of the policy limits at the outset.
  - Provides that a contingency fee multiplier for an attorney fee award is appropriate only in a rare and exceptional circumstance, adopting the federal standard.
  - **Repeals Florida's one-way attorney fee provisions for insurance cases**.

**The bill provides an effective date of July 1, 2023.** The bill was filed on February 15, 2023. That evening, the bill was referred to the Civil Justice Subcommittee, the Judiciary Committee, and the Civil Justice Subcommittee. On February 17, the bill was added to the civil justice subcommittee's agenda. I will post updates on the bill, but practitioners can track the bill at the link provided. Now is the time to get involved if at all possible. The staff analysis dated 2/17/23 has been published.

The full staff analysis is here:
https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0837.CJS.DOCX&DocumentType=Analysis&BillNumber=0837&Session=2023

Bill tracking is here: https://www.myfloridahouse.gov/sections/bills/billsdetail.aspx?BillId=77575

**First DCA**

## Anderson-Moody v. Wilson—(Per Curiam Roberts, Bilbrey, and M.K. Thomas; 1st DCA; 2/15/23).

This personal injury appeal concerns wrongful admission of expert testimony. (Note: I'm not going to lie. I view my job as reporting what the court said, not reporting my own thoughts. Readers need to know what courts are holding, not whether some guy thinks they got it "right." But this one is hard to square with my knowledge of the Florida evidence code, though every judge on the panel is highly experienced).

The defendant disputed the portion of a verdict in the plaintiff's favor devoting around $340,000 of the $1.6 million verdict to the need for future facet injections and epidurals. The only witness who testified that the plaintiff would need such injections was not one of the treating physicians; it was the life care plan expert called by the plaintiff. While many life care plan experts are not physicians, this one was. Dr. Ahmadian is a neurosurgeon, and the doctor had reviewed the plaintiff's medical records and conducted a physical examination of the plaintiff as part of drawing up the life care plan.

The defense preserved the issue by filing a motion *in limine* and then filing a motion for new trial and a motion for remittitur objecting to the testimony about injections as beyond the scope of Dr. Ahmadian's expertise. The judge partially granted the motion in limine, allowing the doctor to testify only as a life care plan expert, not express medical opinions.

On the face of it, it seems like hiring a life care plan expert who is also a physician is an excellent way to demonstrate that a life care plan that goes beyond what the treating physicians are recommending is based on actual expertise. What business does a non-physician life care expert have with disagreeing with treating physicians about future medical needs? But a physician life care plan expert seems well qualified to do so. And the jury accepted Dr. Ahmadian's testimony. But the DCA seems to have held Dr. Ahmadian's medical qualifications against him.

Yes, the standard of review is abuse of discretion. Yes, section 90.704, Fla. Stat., allows experts to base their opinions on facts in evidence or upon his knowledge if they are the type reasonably relied upon by experts in the subject. Yes, experts may be qualified by experience or training or both. But while Dr. Ahmadian had a medical degree, most life care plan experts don't. The DCA focused on the language in case law that says that experts are entitled to rely on facts or data that **are reasonably relied upon by experts in the field**. Most life care plan experts are not doctors, and the trial court had granted the defense motion *in limine* in part, excluding the doctor's medical opinions but admitting the life care plan opinions. Specifically, the court states that while the doctor was a neurosurgeon,

> [n]othing in the record indicates that life care plan experts typically use their experience as a physician to determine the future medical care needs of plaintiffs. Rather, life care planners rely on admissible evidence from medical experts or treating physician when creating the life care plan.

The DCA specifically stated:

> The question presented is whether an expert witness, offered as a life care planner, may infuse his or her own medical opinions in calculating certain costs of future medical care when such future care is not recommended by a treating physician or medical expert. We answer the question in the negative.

Without that doctor's testimony, no evidence supported the $340,000 for injections, so that portion of the judgment was reversed.
https://supremecourt.flcourts.gov/content/download/860211/opinion/212560_DC13_02152023_142320_i.pdf

**Second DCA**

## Publix Super Markets, Inc. v. Roth—(C.J. Morris; 2DCA; 2/17/23).

In this slip-and-fall case, the plaintiff set Publix's corporate representative for deposition under Florida Rule of Civil Procedure 1.310(b)(6). Plaintiff slipped on a transitory substance. Roth sought information regarding similar incidents at any Publix store (not just in Florida) for the ten years preceding his slip and fall. He also sought information on corporate practices and policies that would support a "negligent mode of operation" theory, but that theory has been eliminated under Florida law.

When the trial court denied a protective order based on overbreadth in light of section 768.0755, Florida Statutes (2017), Publix filed a petition for a writ of certiorari.

"Certiorari review 'is appropriate when a discovery order departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal.'" Overbreadth is not ordinarily something that can be raised in a petition for cert, but a discovery order can be challenged for overbreadth if it crosses over the line into granting "carte blanche" to irrelevant discovery.

In cases where a plaintiff alleges that he tripped on a transitory substance, section 768.0755, Fla. Stat., requires that the plaintiff show that the business had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Caselaw holds that discovery about prior slip-and-falls is restricted to that specific store location, not the total network of stores under the corporate umbrella of ownership.

The Second DCA followed the January 25, 2023, decision in Publix Super Markets v. Blanco from the Third DCA that holds that discovery orders that require corporate reps in transitory-substance slip-and-fall cases to provide discovery on the issue of notice that extends to the whole corporation, not just notice from the specific store in question, depart from the essential requirements of law. The court left the door open slightly, stating that "Unless Roth can show that the information he requested is relevant to Publix's actual or constructive knowledge of the dangerous condition that caused Roth to slip at the Publix store at issue, Roth is not entitled to the information." The order was quashed.

The court dismissed the petition with respect to the work product claims, finding them premature, noting: "If the trial court later applies the correct standard of relevancy under section 768.0755 and

determines that certain information is 'otherwise discoverable,' Publix will have an opportunity to file a privilege log."
https://supremecourt.flcourts.gov/content/download/860329/opinion/222124_DA16_02172023_083336_i.pdf

**Fourth DCA**

## Topvalco Inc. v. Wolff—(Per Curiam Warner, Ciklin, and Forst; 4DCA; 2/15/23).

This was a personal injury law case where the plaintiff sued a property owner and a property manager after he fell in a hole in a parking lot. The landowner filed a cross-claim against the property owner, arguing that both contractual and common law indemnity places full liability on the property manager.

The property manager moved to dismiss the counterclaims, and the trial court agreed, finding that the landowner had a nondelegable duty.

The property owner appealed, arguing that it didn't matter if they had a duty to an invitee; they could still enter into contracts with a property manager to indemnity them.

The DCA agreed that the trial court was wrong and that the nondelegable duty does not prevent indemnification. That said, the DCA affirmed because the issue was not preserved for review. Without getting into what was actually argued in the trial court, the DCA held that the error appeared for the first time on the face of the order granting the motion to dismiss, but the property owner did not move for rehearing or otherwise timely bring the error to the trial court's attention. Fortunately for the lawyer involved and his or her malpractice carrier, the DCA also noted that it would have affirmed on the merits because the specific contract language at issue would not have successfully indemnified the landowner.
https://supremecourt.flcourts.gov/content/download/860164/opinion/213143_DC05_02152023_100147_i.pdf

## United Automobile Insurance Company v. Gibson M.D., P.A.—(C.J. Klingensmith, 4DCA; 2/15/23).

This is an appeal about attorney's fees. This was a PIP (personal injury protection) case. The injured insured assigned benefits to his doctor and the urgent care center that treated him. Though this case involves an assignment of benefits, the holding would apply even if it were just the plaintiff suing in his own right.

There was a dispute about the benefits owed, and the Insurer eventually filed a confession of judgment for $21.31 and $7 in interest, and the Insurer conceded fee entitlement.

The doctor sought attorney's fees under section 627.428, Fla. Stat, and also based on the confession of judgment, but the doctor did not allege any unreasonable conduct by the Insurer.

The trial court awarded over $10,000 in fees. Around two of the attorney hours (from a total of around 24 hours) were for pre-suit attorney time. The appeal only involved those two pre-suit hours.

The DCA held that presuit attorney time cannot be awarded unless those fees are the result of an insurer's unreasonable conduct. No such conduct was alleged, and no unreasonable conduct appears in the record. Wrongful denial of a claim, on its own, cannot support a finding of unreasonable conduct. There is no discussion in the case about the effect of a stipulation to fee entitlement. Presuit attorney fees were reversed and the case was remanded. The rest of the fee award was affirmed. https://supremecourt.flcourts.gov/content/download/860174/opinion/221186_DC08_02152023_102852_i.pdf

**Fifth DCA**

## Ramsay v. South Lake Hospital, et al—(C.J. Lambert; 5DCA; 2/17/23).

This pro se civil litigant lost at the trial and appellate level, but the Fifth DCA saw fit to write 14 pages in the case.

In 2016, Ramsay was in a motor vehicle accident, and she was taken to the ER at South Lake Hospital. She was discharged a few hours later, with the ER doctors telling her that her pain was from arthritis.

Ramsay went to a different medical facility three days later, where those doctors diagnosed her with numerous fractures in her back.

In 2020, Ramsay filed a *pro se* complaint alleging "negligence" against South Lake. The hospital moved to dismiss, but the court gave her an opportunity to amend.

In the amended complaint, Ramsay named two of the South Lake ER doctors as additional defendants, and she continued to allege, essentially, medical negligence/malpractice for failing to properly diagnose her.

There is a small wrinkle. In addition to basic medical negligence, she alleged a violation of section 395.1041, Fla. Stat, a statute on the right to access to emergency services and care. Subsection (5)(b) of that statute, however, provides that

> Neither the hospital nor its employees, nor any physician…shall be liable in any action arising out of a refusal to render emergency services or care if the refusal is made after screening, examining, and evaluating the patient, and is based on the determination, exercising reasonable care, that the person is not suffering from an emergency medical condition….

South Lake and one of the doctors moved to dismiss the amended complaint, alleging that it was just a medical malpractice claim, and it was barred under the statute of limitations because it had not been filed within 2 years of the accident or even within the 4-year statute of repose. The other doctor also moved to dismiss for an additional basis, arguing that even if the section 395.1014 claim was deemed separate from a medmal claim, she was still past the four-year statute of limitations for an action based on statutory liability under section 95.11(3)(f). The doctor was sued nearly six years after the ER visit.

Ramsay admitted that her claim was filed after the 2-year point, but argued that her claims against the doctors related back to the filing of the initial complaint, which was filed prior to the 4-year mark.

The trial court dismissed all claims with prejudice.

On appeal, the DCA affirmed on the statute of limitations for the statutory cause of action. Adding a new defendant does not relate back unless it is merely correcting a misnomer.

In regard to the medmal cause of action, that, too, was barred by the statute of limitations. Her allegations required showing that the doctors breached the professional standard of care, so it was proper to treat it as a medical malpractice claim subject to the presuit notice provisions and the two-year statute of limitations. The complaint was filed within the four-year statute of repose under section 95.11(4)(b), but she never complied with the presuit requirements of chapter 766. Dismissal with prejudice was proper because it is too late now to comply with the presuit requirements in light of the statutes of limitations and repose. Affirmed.

https://supremecourt.flcourts.gov/content/download/860332/opinion/221161_DC05_02172023_085834_i.pdf