**TERRY’S TAKES**

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

**Terry P. Roberts**

**Terry@FRTrialLawyers.com**

**Director of Appellate Practice**

**Fischer Redavid PLLC**

**2022 Week 35 (August 22-26, 2022)**

**Eleventh Circuit**

Richmond v. Badia (individual capacity)—J. Brasher. This is an appeal from the Middle District of Florida on the question of whether a school resource officer is entitled to qualified immunity for throwing a seventh grader to the floor in a middle school lobby. (The case arose out of Kissimmee, Florida). Richmond, the plaintiff and appellant, is the student. He wore a hoodie to school to hide a bad haircut, but hoodies are against school policy. For some reason, the mother allowed him to wear the hoodie all the way to school, but then tried to make him take it off at the threshold of the school. The boy resisted and pushed his mother away, which prompted someone in the front office to radio Badia, the school resource officer. While the school resource officer was coming to the front office, the boy apparently removed the hoodie and it “was gone” by the time Badia arrived. Badia “spoke with” Richmond for over two minutes (cursing at him, mocking him, and pointing his finger at him) and then, “without warning,” grabbed the boy’s face to force him not to look away from him. Badia shoved the boy in the chest and threw him to the ground using an “armbar” technique that involved lifting the boy off his feet, flipping him onto his back, and slamming him to the ground. He pinned the boy for over three minutes then released him and shoved him in the back as the boy walked away. There was video of the incident. Badia was prosecuted for—and pled to—criminal battery. He was also fired. The altercation left the boy with wrist, ankle, and back pain and need for treatment that lasted years. The student then sued for civil claims of false arrest and excessive force under 42 U.S.C. § 1983 and a Florida state claim of battery. The district court granted summary judgment to Badia on qualified immunity grounds on the federal claims and on statutory immunity on the state law battery claim. On appeal, the Eleventh Circuit examined the claim of qualified immunity, noting that for qualified immunity to apply, a government official must initially establish that he was acting within his discretionary authority when the alleged wrongful acts occurred. Badia did so, as he was responding to a call within his function as the school resource officer. Once it has been determined that an official was acting with the scope of his discretionary authority, the burden shifts to the plaintiff to establish that qualified immunity is inappropriate. First, the plaintiff must show that the official’s alleged conduct violated a constitutionally protected right. Second, the plaintiff must demonstrate that the right was clearly established at the time of the misconduct. In regard to the constitutional right at issue, the court noted that it had to examine the claims for false arrest and excessive force separately; it could not conflate the two. 1983 claims of false arrest and excessive force are both grounded in the Fourth Amendment’s protection against unreasonable searches and seizures. To succeed on a false arrest claim, a plaintiff must establish (1) a lack of probable cause and (2) an arrest. An arrest—the quintessential seizure of a person—occurs when the government applies physical force to seize a person or asserts lawful authority to which the subject accedes. In an excessive force claim, however, the lack of probable cause is not an element. Even if there was probable cause to arrest (which defeats a claim for false arrest), the manner in which the search or seizure is executed is the issue in an excessive force claim. But one the other side, arguments by a plaintiff that any force was excessive because there was no probable cause to arrest is also not sufficient to support a claim of excessive force. The different between false arrest and excessive force claims is simple: false arrest is about **whether the arrest should have occurred**, and excessive force is about **how much force was used** regardless of whether the arrest was legal. Understanding that, the child’s battery upon his mother (the initial struggle and unwanted touching) gave probable cause to seize the boy. Thus, the arrest was protected by qualified immunity and the district court was correct to grant summary judgment on the false arrest claim. In regard to the excessive force claim, however, the existence of probable cause was not the end of the inquiry. In reviewing the use of force, courts balance the nature and quality of the intrusion on the individual against the government justification for using force by examining: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. They also consider the justification for the application of force, the relationship between the justification and the amount of force used, and the extent of any injury inflicted. Application of these factors, the Eleventh Circuit observed, had “elucidated some general principles.” First, unprovoked force against a non-hostile and non-violent suspect who has not disobeyed instructions violates that suspect’s rights under the Fourth Amendment. Second, the absence of a legitimate law enforcement justification for using force is indicative of excessive force. Under these principles and taking the child’s view of the facts as true, the Eleventh Circuit concluded that “Badia used excessive force under the Fourth Amendment” because there was no law enforcement justification for the attack, the child’s crime was minor (at most, a misdemeanor battery), he posed no threat, he was a child and smaller than Badia, and he did not refuse to obey any lawful commands. A “reasonable jury could conclude that Badia used excessive force.” The court then moved to the “clearly established” prong. The court recited the three ways in which a constitutional right can be proven to be “clearly established”: 1) materially similar caselaw placed the defendant on notice he or she would be violating a constitutional right; 2) a broader, clearly established principle controls the facts of this novel situation and provided fair warning that the conduct was unlawful; or 3) if no materially similar caselaw exists, an official may still have notice when their conduct violates a constitutional right “with obvious clarity.” Notice was proven under the second type—a broader, clearly established principle—of a Fourth Amendment violation for use of gratuitous and excessive force against a suspect who is under control, not resisting, and obeying commands. While the cases cited for this broader principle mostly involve handcuffed persons, the same rationale applies prior to handcuffing. There are specific cases about throwing a non-resisting, unhandcuffed arrestee to the ground. Second, the facts also satisfied the “obvious-clarity” test. Every reasonable officer would know the conduct was unlawful. The conduct was over-reactive and disproportionate relative to the response of the apprehended person. Finally, in regard to the state battery claim, the court examined the district court’s holding that Badia was entitled to statutory immunity. Under section 768.28(9)(a), Fla. Stat, no officer can be held liable for action within the scope of employment unless the officer “acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.” But a reasonable jury could conclude that Badia acted maliciously, in bad faith, or with wanton and willful disregard of Richmond’s rights. Thus, the summary judgment in Badia’s favor for false arrest was affirmed, but summary judgment on the 1983 excessive force claim and the state battery claim were reversed.

Rodriguez et al v. Branch Banking & Trust Company et al-J. Rosenbaum. This is a fascinating case that upends the notion, at least in federal court, that appeals are governed solely by matters in the record and that it is possible to keep pushing an argument regarding a discovery violation even while a case is on appeal. The underlying facts showed that an employee of the defendant bank, BB&T, worked with another thief to transfer $850,000 out of plaintiffs’ accounts by impersonating them. The plaintiffs sued for breach-of-contract and tort claims and a Florida state-law demand for repayment because Florida banks are required by state law to refund customers for fraudulent transfers. The district court dismissed the tort claims as duplicative of the contract claims. The district court then granted summary judgment to the bank on the remaining claims, finding that the alleged contract provisions were not breached. In regard to the demand for repayment of a fraudulent transfer, the contract between the parties reduced the one-year limit under the statute for reporting a suspected fraudulent transfer to only a 30-day window. The plaintiffs had reported the fraudulent transfer within a year but after more than 30 days had passed. The Eleventh Circuit decided that the one-year period to make a demand for a refund of a fraudulent wire transfer under Florida Statutes § 670.202 may not be modified by the parties—you always get one year to report a fraudulent transfer, so the dismissal for failure to comply with the 30-day window was reversed. The case is most interesting, however, because while the case was on appeal, BB&T, the bank, produced new discovery. BB&T moved in the Eleventh Circuit court for an extension of time to file its responsive brief on appeal, explaining that it had found documents relevant to the case. (NOTE: Reading between the lines, it does not seem like new discovery could have possibly helped BB&T in a case where they had won on motions to dismiss and motions for summary judgment, but BB&T’s attorneys may have discovered some fraud that they were ethically bound to disclose). In response, the Appellants/Plaintiffs moved for relief from the judgment under Rule 60, Fed. R. Civ. P., in the district court and asked the district court to order production of the documents. (NOTE: Rule 60 allows a movant to seek relief from a judgment or order on grounds such as mistake, surprise, newly discovered evidence, fraud, misrepresentation, or misconduct by a party, or any other reason that justifies relief. One would think that the appeal would have robbed the district court of jurisdiction to consider the motion while the matter was pending in the Eleventh Circuit, but the issue of whether the lower court had jurisdiction to consider the Rule 60 motion while the appeal was pending was not discussed in the opinion). The district court denied the motion without prejudice in the event of a limited remand. In the Eleventh Circuit (and at oral argument), the plaintiffs argued that the new discovery could make a difference in the case. The idea of discovery that came to light after an appeal was filed and while the appeal was still pending having a material effect on that appeal is unusual; the parties are usually bound by matters in the record. But the Eleventh Circuit observed:

We aren’t sure whether these new documents will alter the district court’s conclusion about commercial reasonableness[, one of the alleged breaches of contract]. But the district court should have the first opportunity to rule on the importance of the documents. See Fla. v. Cohen, 887 F.2d 1451, 1455 (11th Cir. 1989)(“[A] remand to the district court for further proceedings is necessary because new evidence has been developed that may shift the district court’s assessment of the issue.”).

The Eleventh Circuit vacated the district court’s orders dismissing the tort claims and entering summary judgment against the Appellants on their contractual, statutory, and declaratory judgment claims for relief. Given BB&T’s late production of discovery, on remand, the district court was instructed to allow the Appellants to take new discovery based on the recently produced discovery and, if necessary, to replead their claims.

Sailboat Bend Sober Living, LLC v. The City of Fort Lauderdale, Florida-J. Marcus. The appellant/plaintiff is a for-profit sober living home that houses up to 11 people recovering from addiction who support each other in their sobriety and pay $150 a week to stay in the home. The home sued under the Fair Housing Act and the Americans with Disabilities Act, alleging that Miami’s city code enforcement decisions were motivated by hostility toward people with disabilities and that a zoning ordinance was facially discriminatory against people with disabilities. Both the district court and the Eleventh Circuit found that the city was entitled to summary judgment because there was no evidence of discrimination. The plaintiffs were not disabled; rather, they were dissatisfied that they had to comply with codes that provided exceptions for care centers for disabled persons. In other words, the plaintiffs’ sober living facility had to comply with the code, but a home for disabled persons would not have. The texts of the FHA and the ADA each require a plaintiff alleging disparate treatment to prove that he was treated not only differently but ***less favorably*** than a similarly situated, non-disabled person. In other words, those laws do not prohibit the law from giving perks to the disabled. The court found that the relevant codes treated disabled persons differently, but the codes were ***more favorable*** to the disabled than non-disabled persons. Thus, there was not “discrimination” within the meaning of the FHA or ADA. The remainder of the 32-page opinion is fact-specific and is not summarized.

Stansell v. Revolutionary Armed Forces of Columbia-J. Jordan. This was one of a slew of consolidated cases that is, itself, only the latest in a “long-running legal battle over attempts to satisfy a 2010 default judgment of $318 million under the Anti-Terrorism Act” against the Revolutionary Armed Forces of Columbia for murder and kidnapping. The court noted that “when the defendant liable for a sizable judgment is a foreign terrorist organization, collection efforts” related to the judgment “are not surprisingly often directed at third parties.” The consolidated appeals involved whether a number of entities constituted agencies or instrumentalities of the terrorist organization, and the court found that several were and remanded for further proceedings.

State of Georgia et al v. President of the United States-J. Grant. This is a newsworthy non-personal-injury case reviewing an injunction that enjoined—nationwide—the president’s executive order requiring that government contractors be vaccinated against COVID-19. Alabama, Idaho, Kansas, and South Carolina are also parties in the suit. The district court entered a nationwide preliminary injunction after concluding that the plaintiffs were likely to prevail on their assertion that the mandate was outside the scope of the Procurement Act (and, thus, the president had exceeded his authority). The district court (the Southern District of Georgia) ordered the federal government not to enforce the mandate in any covered agreement. A two-judge majority (Judges Grant and Edmonson) agreed that the plaintiffs’ challenge to the mandate would likely succeed and that they are entitled to preliminary relief. The court held, however, that the injunction’s nationwide scope is too broad, so they vacated it. It was too broad because it extended nationwide and without distinction to plaintiffs and nonparties alike. The injunction, after modification by the Eleventh Circuit, will apply to all federal agencies, but it will only enjoin them from enforcing the mandate against the seven plaintiff States and their agencies and members of Associated Builders and Contractors. The court’s order no longer enjoins the federal government from enforcing the mandate in new and existing procurement contracts between the federal government and nonparties, or in the selection process following solicitations in which none of the seven states participate as a bidder. Judge Anderson CONCURRED that the lower court’s injunction was overbroad, but DISSENTED about the merits of the suit, finding that there was no likelihood of success on the merits because the president has the authority under the Procurement Act to impose vaccine requirements on federal contractors.

**Supreme Court of Florida**

Conage v. United States of America-C.J. Muñiz. This criminal opinion is briefly summarized because it involves a certified question from the Eleventh Circuit. For purposes of federal sentencing under the Armed Career Criminal Act, the Eleventh Circuit certified a question of state law to the Supreme Court of Florida. The question came down to whether Conage “purchased” illegal drugs within the meaning of 893.135(1)(b)(1), Fla. Stat. (2006) if he paid for drugs but had not yet received them and did not possess them at the time of his arrest. With a special concurrence from Justice Labarga, a unanimous court held that a completed purchase requires proof that the defendant both (1) gave consideration for **and** (2) obtained control of a trafficking quantity of illegal drugs. This actually functioned as a win for the United States, not Conage, because Conage would only be sentenced to an enhanced sentence if the word “purchase” under Florida trafficking law encompassed possession of the drugs. (NOTE: While this opinion is bad for Conage, it seems like the decision will be cited most often by defendants seeking to defeat trafficking convictions where they paid for illegal drugs but had not yet been handed the drugs. The court admitted as much in its odd discussion of the rule of lenity, where it stated that it did not need to resort to applying the rule of lenity in this case, but if it did apply the rule of lenity, it would interpret the statute in a way that is favorable to a generic defendant facing trafficking charges, not Conage’s specific case. Because their interpretation of the statute requires payment plus control, not just payment, it makes “proof of a completed purchase” under the trafficking statute “more difficult…and so favors the accused in a prosecution to enforce the statute.)

In Re: Amendments to Florida Rule of Civil Procedure 1.530 and Florida Family Law Rule of Procedure 12.530-Per Curiam. **RULE CHANGE ALERT!!** On the court’s own motion, it made a major change to the rules of civil procedure to clarify that ***filing a motion for rehearing is required to preserve an objection to insufficient trial court findings in a trial court order***. The trial court expressly added the sentence, “To preserve for appeal a challenge to the sufficiency of a trial court’s findings in the final judgment, a party must raise that issue in a motion for rehearing under this rule.” (NOTE: A motion for rehearing is not ordinarily required to preserve an issue that was objected to during the trial proceedings and ruled upon. The way to distinguish this instance in your head is that the lack of a finding in an order is an error that springs from face of the final judgment, so the only way to truly preserve the error is by a motion for rehearing challenging the deficiency in the written order.) In the commentary to the rule, the court expressly added that the amendment does not address or affect, by negative implication, any other instance in which a motion for rehearing is or might be necessary to preserve an issue for appellate review. The court made the rule change ***effective immediately***, but because there was no comment period, the court indicated that it would give 75 days in which to file comments with the court.

In Re: Amendments of Florida Rules of Civil Procedure 1.530 and 1.535-Per Curiam. The Supreme Court of Florida made a further change to the rules of procedure to clarify that the time for filing a motion for new trial or motion for rehearing is within 15 days after the ***filing*** of the judgment, whereas the rule previously stated 15 days after “entry” of the judgment, which led to confusion when the filing date was later than the date of an oral ruling or the signing of an order. Rule 1.535 was deleted and re-inserted as new subdivision (h) of Rule 1.530. **Also, “remittitur or additur” was added to the title of the rule to reflect that the rule is now applicable to motions for remittitur and additur.** These amendments will become effective on October 1, 2022.

In re: Amendments to Florida Rule of Criminal Procedure 3.220, Florida Rule of Civil Procedure for Involuntary Commitment of Sexually Violent Predators 4.310, and Florida Rule of Juvenile Procedure 8.060-Per Curiam. The court adopted rule changes that-in the types of cases that fall under these rules, NOT civil or personal injury cases—precludes the visual recording of adult deponents unless ordered by a court or agreed to by the parties and the deponent, requires the audiovisual recording of depositions of minors unless otherwise ordered by a court, and prohibits the photographing of deponents during discovery depositions.

Mintz Truppman, P.A. v. Cozen O’Connor, PLC-J. Couriel. The court quashed a 2020 decision by the Third District Court of Appeal. An insured hired Mintz to represent her in a dispute against her insurer regarding her homeowner’s insurance. The insurance company hired Cozen to act as defense counsel. The defense removed the case to the Southern District of Florida and then settled the case. In approving the settlement, the judge retained jurisdiction to enforce the settlement and determine the amount of attorneys’ fees. Mintz sought over $800,000 in fees. As part of the fee dispute, Cozen filed Mintz’s initial settlement demand letter to show that the plaintiff initially sought more than she eventually received in the settlement. Mintz then sued Cozen and the insurance company in Florida court for attaching the demand letter, arguing that the earlier demand was supposed to be confidential under mediation rules. Both parties moved to dismiss, and the trial court denied the motions. Cozen and its client challenged the denial of the motion to dismiss via a petition that they argued could alternately be granted as a petition for writ of prohibition or a writ of certiorari. They argued that the Florida circuit court exceeded its jurisdiction in entertaining the suit by Mintz because Mintz was the plaintiff’s law firm, not the actual party. They also argued that Mintz was collaterally estopped from filing the suit because it had been resolved in federal court. The insurance company also argued that any act occurring during the course of a judicial proceeding—including the filing of the settlement offer letter—was entitled to absolute immunity where it had some relation to the proceeding. The Third District agreed with the petition in regard to the collateral estoppel defense and dismissed the other arguments as moot. Collateral estoppel is shown when 1) the issue raised is identical to the one involved in the prior litigation; 2) the issue was actually litigated the prior suit; 3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in that action; and 4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. The Third DCA issued a writ of prohibition on the grounds that the circuit court had no jurisdiction to entertain litigation on something resolved in federal court. Mintz appealed the Supreme Court of Florida. Justice Couriel provided a refresher on a writ of prohibition, noting that it is narrow in scope. It is a writ by which a superior court may prevent an inferior court from exceeding its jurisdiction. Critically, the court reminded us that the writ can only be used **preemptively** to **stop** a court from acting, not to correct or undo something that has already been done. One must obtain the writ (or at least apply for it) before the court does the thing in excess of its jurisdiction. The writ is not to be used to challenge the denial of a motion to dismiss. If it could be used in that way, any denial of a motion to dismiss could be challenged by a writ of prohibition, which would circumvent the rules on interlocutory appeals. Rule 9.130 would likely have barred an interlocutory appeal of the order. The court noted that some denials of a motion to dismiss had properly been challenged by a writ of prohibition, but use of the writ to revisit the trial court’s weighing of an affirmative defense like collateral estoppel was improper. The court quashed the order but then instructed the Third DCA to adjudicate the arguments under the writ of certiorari argument that it had previously declared moot.

**First DCA**

Jones v. Schiller—J. Nordby. Rebekah Jones is the former Florida Department of Health who made national and state headlines by being fired from her position helping to run the COVID-19 state website and then arrested and then accusing the DeSantis administration of wrongdoing in hiding the state’s true COVID positivity numbers. Further details and citations are found at <https://en.wikipedia.org/wiki/Rebekah_Jones> In the past year, Jones announced that she would run for Congress in either Maryland or Florida. She ultimately opted to run in Florida to challenge Matt Gaetz, the incumbent Republican. She filled out a required statutory primary oath swearing—among other things—that she had been a registered Democrat for the prior 365 days. The problem with that was that it was not true. She had been registered with no party affiliation during the year preceding her oath. When her Democratic primary opponent got wind of the false statement, she sued to remove Jones from the ballot, and the trial court granted relief. On appeal, the First District held that even if a candidate’s primary oath is shown to be 100% false, there is nothing the courts can do about it and the circuit court was wrong to remove Jones from the ballot. The DCA held that the statute regarding primary oaths contains no enforcement mechanism. If the candidate fills out the paperwork containing the oath, the Florida Department of State has a ministerial function and it simply accepts the paperwork. After that, there is nothing to be done if a candidate lied. Judge Jay concurred, but Judge Makar CONCURRED SPECIALLY, writing to announce his frustration that the laws as written do not seem to allow either courts or the political parties themselves to ensure that candidates are truly a member of their claimed political party. He decried the “ill-motivated ne’er-do-wells” that “pawn themselves off as legitimate members of a political party, when they are not,” and expressed sympathy for the motives of the trial court in trying to do justice. Like the majority, he invited the Legislature to amend the statute to provide a mechanism to vet candidate’s “bona fides” regarding the primary oath. (NOTE: This opinion was determinative of the race. Jones won her primary and will face Gaetz as the Democratic nominee in November).

**Third DCA**

City of Miami v. Rivera—J. Hendon. This is a case about absolute immunity of firefighters. A black man working as a firefighter was subject to racist intimidation when fellow firefighters defaced his family photos with phallic images and a string shaped like a noose. The fire chief put out a public statement that the six firefighters involved were being fired and that that the department would not tolerate racism. An investigation found that three of the six were responsible for the phallic images, and a different three firefighters had put the string noose on the picture on a completely different day. The plaintiffs in the case were the ones who were involved in the phallic drawings, not the noose. They were later reinstated to their jobs after arbitration. Then they sued the city and fire chief for defamation. Essentially the three who drew the phallic images alleged that they should not have been lumped in with the other three firefighters who draped the noose on the photo because the noose is unquestionably a racist threat and the phallic images were not. They alleged that depicting the three-person “phallic images” group as racists along with the three Klan-types who added the noose constituted defamation. The city and chief, however, moved to dismiss the complaint on several grounds including absolute immunity. The lower court denied the absolute immunity argument, and the city and chief filed a petition for a writ of certiorari. To obtain a writ, one must show a 1) departure from the essential requirements of law; 2) resulting in material injury for the remainder of the case; 3) and the injury cannot be adequately remedied on direct appeal. The last two elements are often combined into what is referred to as the “irreparable harm” prong. Those prongs are jurisdictional and must be analyzed first. Absolute immunity is a doctrine that protects a party from having to defend a lawsuit at all, thus denial of a motion to dismiss on absolute immunity grounds easily meets the test of irreparable harm. Having to go through trial and an appeal would defeat half of the point of absolute immunity. The DCA also held that the trial court departed from the essential requirements of law. Florida public officials are absolutely immune from defamation suits as long as their allegedly defamatory statements were made within the scope of their duties. The chief’s press release and public statements about rooting out discrimination were within the scope of the chief’s job. End of story. Absolute immunity applies. Reversed and remanded to dismiss the defamation claims.

Kraus v. Kraus-J. Logue. This family law case is applicable to any Florida civil case. It examined the former wife’s motion for judgment on the pleadings. Judgment on the pleadings must be decided wholly on the pleadings and is granted only if the pleadings establish the movant’s right to judgment as a matter of law. Except that that’s not what happened here. At the hearing on the motion for judgment on the pleadings, the former husband testified about his financial hardship, a new medical condition that impacted his ability to earn income, and loss of income. These issues were not contained in the pleadings. The DCA cited caselaw that holds that a trial court is without jurisdiction to hear and determine matters which are not the subject of appropriate pleadings and notice. But despite the above standards about judgment on the pleadings being a matter of law and the trial court lacking “jurisdiction” to consider matters that are not in the pleadings, the DCA cited different caselaw that stands for the proposition that when an issue is tried by “implied consent,” due process concerns are alleviated. There is “implied consent” when a party raises arguments and evidence and there is no objection by the opposing party. The DCA found that the former wife failed to object to the husband’s testimony, so the issue was tried by implied consent, all the other standards for judgment on the pleadings are thrown out the window, and it was fine for the judge to consider the testimony. Affirmed.

Neiman Nix and DNA Sports Performance Lab, Inc., v. The Office of the Commissioner of Baseball d/b/a Major League Baseball, Neil Boland, and Ricardo Burnham—J. Logue. Judge Logue and the Third DCA issued a yet another opinion dealing with judgments on the pleadings. The appellee (the commissioner of baseball) had attempted, in the trial court, to challenge the plaintiff’s complaint on statute of limitations grounds, arguing that the plaintiff knew or should have known about his cause of action for than four years prior to filing the complaint. To prove his point, the commissioner pointed to documents he had attached to his Answer that showed copies of other complaints that the plaintiff had filed in other cases in 2014 and 2016. The plaintiff was not required to respond to the Answer, however. Rule 1.110(3) states that any averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided. In a motion for judgment on the pleadings, all the factual allegations by the non-movant must be taken as true and all factual allegations that have been denied “are taken as false.” Because the authenticity of the 2014 and 2016 complaints were deemed denied, the judge erred in accepting them as a basis for entering a judgment on the pleadings.

Phil Collins Update-For those who enjoyed the case summary where the Third DCA found that the circuit court had jurisdiction over the fight between Phil Collins and his ex-wife in regard to the south Florida home they once shared, there is an update to the update. On Friday, August 26, the trial court apparently dismissed the ex-wife’s case because she had made 10 separate violations of the court’s orders. In a hearing transcript seen by a news webpage, the judge apparently stated: “I’m done with this. You can go ahead and prepare the order of dismissal…. I feel comfortable that enough is enough.” Details and scuttlebutt are here <https://pagesix.com/2022/08/26/ex-wifes-20m-lawsuit-against-singer-phil-collins-dismissed/> and here <https://www.vanityfair.com/style/2022/08/judge-in-phil-collins-case-says-enough-is-enough?fbclid=IwAR072S6jIt1wWKRi6P6lytTgs5UGXPiWZwn7ZTxiB0V2AecOSGp0nt-mD6A>

Vital Pharmaceuticals, Inc. v. Kesten-J. Gordo. This is an important case of first impression. Kesten moved to dismiss the appeal. Under new amendments to Rule 9.130(a)(3)(G), the motion was denied. The 2022 amendment to the rule expressly authorizes interlocutory appeal of nonfinal orders granting or denying leave to amend a complaint to assert a claim for punitive damages. Interestingly, the parties agreed that under the new rule, the appeal was proper. The argument was about whether the old rule or the new rule applied to the appeal. The Supreme Court of Florida issued its opinion containing the amendment to the rule in January 2022, but the opinion stated that the rule change would not be effective until April 1, 2022. The order being appealed in this case was entered in March 2022, prior to April 1. The notice of appeal, however, was not filed until **after** April 1. Thus, the issue was whether to apply the rule as it existed in March 2022—the date of the order being appealed—or as it existed on the day that the notice of appeal was filed. This was important because prior to the rule change, the Appellant would have had to challenge the order via a petition for a writ of certiorari, a far tougher standard to satisfy. The Third DCA opined that no prior Florida case has dealt with this situation. The Third DCA distinguished some similar cases—particularly cases on the timing of the new summary judgment standard—and held that for rules conferring jurisdiction in an appeal, the courts should **apply the rule as it** **exists on the date that the notice of appeal is filed**. Because the April 1 rule change was in effect when the notice of appeal was filed, the fact that the order on appeal was rendered back in March did not defeat jurisdiction, and the motion to dismiss the appeal for lack of jurisdiction was denied. Judge Logue CONCURRED SPECIALLY, arguing that rather than being a matter of first impression, the result was “well supported by Florida law.”