**TERRY’S TAKES**

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

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**Remote Court Proceedings**

The Florida Bar news posted a link to a new 11-page guide as to the Florida Bar’s recommended best practices for remote court proceedings. With the sweeping new rule changes taking effect in October, it might be worth a read. Here is the link to the downloadable PDF.

<https://www-media.floridabar.org/uploads/2022/08/TFB-Best-Practices-Guide-For-Remote-Court-Proceedings-2022-Edition.pdf>

**Eleventh Circuit**

Carrizosa and other consolidated cases v. Chiquita Brands International, etc al—(J. Jordan; 11th Cir.; 9/6/22). There is a genuine issue of material fact that Chiquita—the well-known fruit company—supported terrorism and is responsible for deaths of Columbian citizens. The appeal arises from a massive and complex multi-district litigation (“MDL”) proceeding based on claims—brought in part under the Torture Victim Protection Act, 28 U.S.C. § 1350 and Colombian law—that Chiquita Brands International and some of its executives provided financial support to the Autodefensas Unidas de Colombia (“AUC”), a paramilitary group designated as a foreign terrorist organization by the U.S. Secretary of State that murdered thousands of persons in Colombia. Between 1997 and 2004. Chiquita Brands International paid over $1.7 million to back the AUC while Columbia was embroiled in a civil war. The AUC was aligned with the government and murdered people they viewed as subversive. In 2007, Chiquita pled guilty to crimes related to backing the AUC, and family members of those killed sued Chiquita. The opinions in the case are a total of 104 pages long, so I have opted to summarize only the unusual bits of law. The district court excluded several pieces of information that placed blame on Chiquita for the deaths of Columbian victims of the AUC, and after the evidence was excluded, the district court granted summary judgment. The Eleventh Circuit affirmed in part, but reversed in part, finding several pieces of the information admissible and finding that they gave rise to a genuine issue of material fact. The district court applied Rule 803(8) and held that public records such as indictments and reports of prosecutors and investigators from Columbia were admissible including the opinions and findings. The most interesting classification of evidence wrongly excluded by the district court was expert testimony meant to show that some decedents were probably killed by the AUC based on circumstantial evidence of the group’s *modus operandi* and evidence that the group was present and operating in the area where various decedents were killed. The court noted that there had long been a debate, in both judicial and academic circles, about whether so-called “naked statistical evidence” can sometimes allow a civil plaintiff to withstand summary judgment and prevail at trial. The court held that for purposes of this case, statistical evidence could, depending on its nature, be probative on the question of who committed the murders at issue. In cases such as this one, involving acts of violence allegedly perpetrated by a terrorist group and its members, plaintiffs often lack direct evidence and are therefore more likely to rely on circumstantial evidence. “We treat circumstantial evidence the same as direct evidence.” Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. A combination of admissions and reports and statistical evidence such as evidence that 90% of murders in an area were committed by paramilitaries was sufficient to defeat summary judgment. The experts testified that the AUC (1) killed “subversives” by gruesome methods and often left their victims’ bodies in public to send a message; (2) kidnapped victims, often on motorcycles, as a means of terror; (3) killed victims while hooded or masked; (4) took victims from their homes at night; and (5) stopped vehicles at roadblocks to murder people. The district court excluded the collateral crime evidence as bad character evidence under Rule 404(b), but the Eleventh Circuit held that that rule only applies to acts by a specific person, although there is a split of authority on this question. Rule 404(b) does not apply to evidence pertaining to acts committed by others, even members of a conspiracy or evidence that implicates a witness or another non-party to the litigation. Where the evidence concerns a third party, there is no presumptive exclusion under Rule 404(b) and the only question is relevancy. The evidence was relevant (because it showed that some of the murders were consistent with AUC’s methods and were committed at times when the AUC was nearby), and the defendants were Chiquita and some of its executives, not AUC members, so the evidence was not barred as bad character evidence. The circuit court also examined 2019 amendments to rule 807, which now allows a hearsay statement to be admitted in federal court even if it doesn’t fall under any exception in Rules 803 or 804, if the statement (1) “is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement,” and (2) “is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.” The 2019 amendment to Rule 807 embodies “a more general call for reliability.” The summary judgment on some claims were affirmed, while others were reversed and remanded for trial.

Chabad Chayil, Inc. v. The School Board of Miami-Dade County, Florida et al—District Judge Covington sitting by designation; 11th Cir.; 9/8/22). Chabad is a non-profit organization that runs programs for the Jewish community in the Miami-Dade area including an afterschool program. School grounds were only open to use for outside groups if the group pays a rental fee, or the fee could be waived if the program is open to the public and was free of charge. Chabad charged a fee and did not pay rent, though it claimed it did not know about the policy that programs must be free or pay rent. There was an anonymous complaint that the group was charging a fee without paying rent, and the Miami Office of the Inspector General (“OIG”) conducted an investigation and issued a report. Based on this, the school denied Chabad further use of the school property and announced they would not review future applications from the group. Chabad sued the school district and the OIG for various violations of constitutional rights relating to free expression and free exercise of religion. First, the school board could only be held liable where “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.” A plaintiff can establish municipal liability in three ways: (1) identifying an official policy; (2) identifying an unofficial custom or widespread practice that is so permanent and well settled as to constitute a custom and usage with the force of law; or (3) identifying a municipal official with final policymaking authority whose decision violated the plaintiff’s constitutional rights. This is called the Monell test, named for Monell v. Department of Social Services, 436 U.S. 658 (1978). Chabad only alleged #3: that a single official, the superintendent, deciding to kick them off of the school campuses constituted a constitutional violation. Where a party alleging the decision of a single official subjects the city to liability, the court examines the following factors: (1) municipalities have section 1983 liability only for acts officially sanctioned or ordered by the municipality; (2) only those municipal officials who have final policymaking authority may subject the municipality to section 1983 liability for their actions; (3) the determination of whether or not a particular official has final policymaking authority is governed by state law, including valid local ordinances and regulations; and (4) the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible for making policy in that particular area of the city's business, as determined by state law. Chabad’s claim failed because the superintendent did not have final authority to kick the program off of campuses. His decisions were reviewable by the school board. Another issue in the opinion was that the trial court considered the OIG report (finding wrongdoing by Chabad) when dismissing the complaint. It is important for practitioners who practice both in state and federal court to remember that unlike the rule in Florida state court (where lower courts are strictly forbidden from consulting documents that are not attached or incorporated in a Complaint at the motion-to-dismiss stage because the judge can only look at the four corners of the document), a federal district court *may consider* an extrinsic document during a motion to dismiss if the extrinsic document is (1) central to the plaintiff’s claim, and (2) its authenticity is not challenged. And when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern. The district court did not err in considering the OIG report. The strangest part of the opinion was the portion devoted to the equal protection claim. Chabad proceeded under a “class of one” equal protection claim, a less-developed strand of equal protection jurisprudence. In a “class of one” claim, a plaintiff alleges not only that it belongs to a protected class, but that it is the only entity being treated differently from all other similarly situated entities. In order to prevail, a plaintiff must show that it has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. The similarly situated requirement is to be applied “with rigor,” and the entities being compared must be *prima facie* identical in all relevant respects. A plaintiff must ultimately show that it and any comparators are similarly situated in light of all the factors that would be relevant to an objectively reasonable governmental decisionmaker. The Court found that Chabad failed this test because the relevant class was not programs that use public school space and charge fees without paying rent. Instead, it the relevant class was programs that use after school space, that charge fees without paying rent, and that have been subjected to an anonymous complaint. The court held that the anonymous complaint distinguished Chabad from the other entities allegedly collecting money while also receiving rent waivers. (Note: the conclusion that a lot of other groups might be violating the same rule, but only the Jewish group was complained about and censured as facts that **defeat** a discrimination claim seems somewhat backward. “You’re not being treated differently for an unfair reason. You’re the only one anyone complained about, so you **are** different.”) Next, in regard to the due process claim, Chabad complained that it was unfairly cut out participation in the OIG investigation and that it was not able to offer its side of the story. It alleged that the report included false and defamatory statements that damaged its reputation. Injury to reputation, however, does not, on its own, constitute a constitutional violation under the Fourteenth Amendment due process clause. Defamation is a state-level tort, not a constitutional violation. To rise to a constitutional violation, a plaintiff must satisfy the “stigma-plus” test wherein the plaintiff shows 1) defamation by the government 2) plus the violation of some more tangible interest. The party has to have a legitimate claim of entitlement to the damaged property. Getting kicked out of the place where they ran their business did not meet this test in the court’s view. They did not have a signed agreement to use the property for the 2019-2020 school year or any year thereafter. There is no “right” to have a school board consider one’s applications to use the school property (the school board stated it would no longer accept applications from Chabad). Even if it had such a property right, the OIG did not do anything that caused harm. OIG did not deny use of the property; the school board did that. The claim was properly denied. Finally, the court affirmed the denial of the right to amend the complaint. Chabad sought leave to amend at the end of its response to the motions to dismiss. Leave to amend must be sought by a separate motion. The court affirmed the dismissal “without leave to amend,” seeming to foreclose the right to file a free-standing motion to amend.

Garcia et al v. Chiquita Brands International—(J. Marcus; 11th Cir.; 9/9/22). This is another opinion relating to the Chiquita lawsuit described above. The opinion’s opening is striking:

This action is about many things. It’s about one U.S. company facing over four thousand accusations of criminal conduct in a foreign country. It’s about a putative class action that lasted more than a decade before the plaintiffs moved for class certification. But for us today, it’s largely about one issue: whether we apply federal law or a foreign country’s law on the availability of equitable class tolling in a Rule 23 class action. At bottom, it’s about the reach of Erie Railroad Company v. Tompkins. For almost a decade, Chiquita Brands International, Inc. (“Chiquita”) funded a violent, paramilitary terrorist group operating in Colombia. Chiquita’s near-decade-long support for the terrorist group spawned over a decade’s worth of litigation.

Like the other Chiquita opinion, the opinion is long and is beyond the scope of a short summary. The application of the Erie doctrine—where federal courts decide whether to apply federal or state law—was exceedingly complicated in this case. The court had to decide whether the statute of limitations had run on some claims. If the Court applied federal law, the statute of limitations would have been equitably tolled for over a decade while the class sought certification. No consideration was given to applying Florida law despite the fact that the multidistrict litigation had been transferred from New Jersey—where the case was initially filed—to Florida. The question was whether to apply New Jersey law. The Erie test involves asking 1) whether there is a conflict between federal and state law; 2) whether a congressional statute or federal rule of civil procedure covers the disputed issue; 3) whether failure to apply state law would lead to a different outcome than the federal rule; 4) whether the countervailing federal interests militate in favor of applying the federal rule over the state law. The court decided that it had to apply New Jersey law, not federal law. But New Jersey’s law had a separate layer of Erie-style analysis where the New Jersey federal court would have had to decide whether to apply New Jersey state law (which would have tolled the claims) or Columbian law (which would not toll them; all class actions have to be brought within two years under Columbian law). Ultimately, the Eleventh Circuit found that New Jersey would apply Columbian law, not New Jersey law, and, thus, the Columbian law claims were time-barred. The Eleventh Circuit affirmed the district court’s holding. The district court also did not abuse its discretion in denying amendment of the complaint to add a claim under the Alien Tort Statute because the plaintiffs only wanted to amend if the Supreme Court issued a favorable holding in Nestle USA v. Doe, a 2021 case, but when the decision came out, the holding—that domestic corporations are not liable under the ATS for causing injuries abroad based on decisions made in the United States—was fatal to their ATS claim. The plaintiffs did prevail, however, on their claim to allow amendment of the complaint to support a minority tolling argument, a tolling provision that comes into play when the victims are minors. It tolls the claim until they reach adulthood. While the claim had to be dismissed for failure to allege the minority status of some of the plaintiffs, the district court abused its discretion in denying leave to amend. Rule 12(b)(6) provides that dismissal on statute of limitations grounds is appropriate only if it is apparent from the face of the complaint that the claim is time-barred. But a plaintiff’s failure to plead facts that would prevent a dismissal on statute of limitations grounds does not typically warrant dismissal with prejudice. Rule 15(a)(2) allows a party to “amend its pleading only with the opposing party’s written consent or the court’s leave” and that “[t]he court should freely give leave when justice so requires.” Generally, where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice unless (1) there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments or (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile. The district court made no such finding, so denial of leave to amend for minority tolling purposes was reversed. The remained of the order of dismissal was affirmed.

Hunstein v. Preferred Collection and Management Services, Inc.—J. Grant; 11th Cir.; 9/8/22). This case is another example of the Eleventh Circuit being deeply divided on questions of standing. The opinion was *en banc*, with angry comments in all three opinions. Judges Pryor, Wilson, Jordan, Rosenbaum, Jill Pryor, Newsom, Branch, Grant, Luck, Lagoa, Brasher, and Tjoflat (who retired but sits as a senior judge) were in the majority. The majority found that a plaintiff lacked standing because he had alleged that the defendant violated a federal statute, but he failed to allege what the majority saw as a concrete harm or injury flowing from the statutory violation. Cases cannot meet the federal test for jurisdiction (a case or controversy) if there is no standing, if the claim is not ripe, or if the claim is moot. Standing requires that a party show injury in fact, causation, and redressability. Here, “injury in fact” was missing. Taking the facts in the complaint as true, Hunstein owed large medical bills relating to his son’s need for medical treatment. When he failed to pay the bills, the hospital sent his name, address, the description of the debt, and the amount of the debt to a third-party company that turned the information over to a mail vendor company, which put the information into a collection letter and mailed it to Hunstein. Hunstein credibly alleged that when the collection agency disclosed his debt to the mail vendor, it violated the Fair Debt Collection Practices Act. The court essentially answered, “So what?” The Supreme Court, in TransUnion LLC v. Ramirez, 141 So. Ct. 2190 (2021), confirmed that an intangible harm cannot confer standing without showing concrete or “real” harm, and the majority concluded that just printing out his information and sending it to him did not cause him and real harm. TransUnion requires that in order to test for actual harm that would give rise to standing, courts should compare the statutory violation to a similar pre-existing common law tort and ask if the harm from violating the statute is comparable to violating the analogous tort. The plaintiff played along and said that disclosing his debt to a third party in violation of the Fair Debt Collection Practices Act was comparable to the common law tort of “public disclosure.” The problem with this theory, in the majority’s view, was that the tort of “public disclosure” required proof of the element of a public disclosure, not a private one. Without publicity, a disclosure cannot possibly cause the sort of reputational harm contemplated by the common law, and this disclosure was not sufficiently public for the majority’s taste. Just because the public has an interest in outlawing disclosure of private information, that does not mean that individuals automatically suffer an injury when their information is disclosed. (Note: The majority seems to miss the fact that the plaintiff did not allege disclosure of everyone’s debt information; he alleged an illegal dissemination of his own information, which seems like more than just vindicating a public interest.) The majority willingly conceded that more than just physical or financial harms can trigger standing. Intangible harms can also trigger standing, especially where Congress provides so. But, confusingly, the majority states that statutes passed by Congress only give rise to private causes of action when Congress identifies a real-world injury and creates a cause of action to redress it, not where Congress attempts to transform something that is not remotely harmful into something that is. The majority feels certain that it can determine if Congress has truly identified a *real* intangible harm, as opposed to supposedly non-harmful intangible harms like the one in this case. Again, the way to do that is by asking whether the new statute being violated by a defendant can be compared and found similar to an old cause of action. If a new intangible harm identified by Congress is missing an element essential to liability under common law, it fails the test. As if anticipating the grumbling, the majority asks, “But why are common-law torts even relevant?” And it answers, “The reason, in short, that we consider traditional torts is because of the harm-to-harm comparison that they engender and elucidate.” Which seems like a circular answer to the question—they value comparison to old causes of action because new causes of action are suspect and courts can feel more comfortable stating “this is a harm” if it would be a harm under an old cause of action. (Note: But then why not either say intangible harms are all disallowed or, if this intrudes on the power of the legislature to make the laws, simply conclude that anything deemed illegal by Congress—if the statute is constitutional—is illegal enough to give rise to a case or controversy and confer standing? Why isn’t violation of a statute a “case” or a “controversy” if the court is prepared to recognize intangible harms? Why are common law elements from hundreds of years ago more important in determining what is a ‘harm’ than statutory elements recently enacted by both houses of Congress and signed into law by the President?). At any rate, the defendant’s act of sending the collection letter to a vendor to print up and mail caused no real harm that the court was prepared to recognize without the debt being communicated to the public. (The notion is perhaps that no one at the mail vendor really pays attention to the names and debts, so there is no harm in someone else handling the information. In an age where information is bought and sold and has value, it's possible this view is naïve, though it is certainly correct that the plaintiff did not allege that anything untoward or illegal was done with the information about the debt. But one has to wonder whether debt relief ads are popping up in this guy’s Facebook feed as we speak). The majority quarreled with the dissent’s point that “living, breathing, thinking individuals” illegally read the plaintiff’s debt information and his name and address, answering that the transfer of information is probably done by computer and there was no suggestion that the “employees have read and understood the information.” The majority noted that the plaintiff’s attorney, at oral argument, refused to go further than simply stating that the employees had “access” to the information, and he was not alleging that anyone actually “read or perceived it.” The court noted that “transmitting information that no one reads or perceives is not publicity.” And without publicity—an element in a common law tort—plaintiff could not show harm or standing. Plaintiff argued—and the majority accepted—that Congress targeted invasions of individual privacy with the Fair Debt Collection Practices Act. But “congressional intent does not automatically transform every arguable invasion of privacy into an actionable, concrete injury.” The majority bristled at the dissent’s observation that the element-for-element approach relegates Congress to “dutifully replication and codifying preexisting common-law causes of action.” The majority answers that it is not that there can never be a cause of action under the Act in a different case; it is just that this particular plaintiff did not allege any harm stemming from the violation of the law. The majority accused the dissent of an “energetic attempt to manufacture a circuit split” with a “grab-bag of cases.” In the end, the majority found that the plaintiff was no worse off for having the private mail vendor be provided with his debt information and that it was not “clear, or even likely, that even a single person at the mail vendor knew about the debt or had any reason—good, bad, or otherwise—to disclose it to the public if they did.” Chief Judge William Pryor and Retired Senior Judge Tjoflat CONCURRED fully, but wrote separately from the 27-page majority opinion to state that the case was simple. To illustrate how simple the case was, they…wrote 15 more pages in addition to the 27 with which they concurred fully. Just 42 “simple” pages. The concurrence would have held that TransUnion was factually on point with the case and directly foreclosed standing based on private, non-public publication when it rejected a theory of relief due to intra-company disclosures and disclosures to “the [mail] vendors that printed and sent the mailings.” The concurrence found this dispositive. The concurrence found it a “tad rich” that the dissent accused the majority of misapplying TransUnion, because the concurring judges thought that it was the dissent who misapplied the case. The concurrence then walked through the analogy to common law torts again and the fact that this seemed to be information processed by computers, not humans, so no one really saw it. “TransUnion’s rule is simple: no communication, no concrete injury.” Taking offense from the bare communication of private information is not actionable without demonstrating actual harm. Judges Newsom joined by Judges Jordan, Rosenbaum, and Jill Pryor DISSENTED in a 37-page opinion of their own. The dissent agreed that harm had to be concrete, that they had to compare the statutory violation to a common-law tort (though the comparison does not have to be identical or exact), and that the proper tort for comparison was the tort known as “public disclosure of private facts.” The dissent agreed that public disclosure was an element of that tort, but stated that the violation alleged was close enough for the required comparison. TransUnion demanded only a *similarity* to a tort, not perfect proof of every element of the proof like what the majority was demanding. TransUnion was a jury case where the plaintiff had opportunity to present evidence; the instant case was at the motion to dismiss stage, and the complaint had to be taken as true. It was impossible to determine whether anyone at the mail vendor actually read the information at this stage, even though the majority was assuming that only computers, not people, read the information. The complaint alleged that the information was “disclosed”—including the sensitive basis of the medical billing, which was related to his son’s medication condition—and the disclosure was to the “employees” of the company, not just their computers. While the plaintiff in TransUnion failed to put on any witness testimony about disclosure to actual people, the same might not be true here. Someone might have read the plaintiff’s private information. The dissent condemned the element-for-element rigid approach, stating that if the majority planned to compare every element of the common law claim and require perfect proof of each element, it embraced the “exact duplicate” standard that the TransUnion court had disclaimed and ignored the case’s language stating that the comparison between the statutory violation and the common law analogous tort need not be exact. TransUnion found liability even though an element of the common law tort—falsity—was lacking; the information in that case was only misleading, not false, but that was good enough for the Supreme Court. Only a “close relationship” to the tort is required. In this case, the tort has three elements. Everyone agrees that the first two were satisfied, and the public disclosure element in dispute was at least close in light of the allegations that the information was “disclosed” to the “employees” of the mail vendor. The dissent analyzed other cases and opined that the Eleventh Circuit had split from seven other circuits in requiring a perfect element-for-element satisfaction of the analogous tort. The dissent lamented that the majority’s approach deprived Congress of the right to innovate and recognize new harms that did not precisely mirror common law torts. Disclosure of the sensitive medical information to employees of the mail vendor was public enough to trigger standing in the dissent’s view. If it was true that no human being ever saw the information, the company could prove that at the summary judgment stage and might very well be entitled to summary judgment…but not dismissal. But the dissent’s view did not carry the day. The majority held that dismissal was required.

**Supreme Court of Florida**

Davis v. State of Florida—(J. Couriel; FLSC; 9/8/22). In criminal cases, the standard for reviewing a judge’s denial of a motion to disqualify the judge for alleged bias or prejudice under section 38.10, Fla. Stat. and Rule 2.330(d)(1) is now a harmless error rule instead of a “per se reversible” test. Assuming the judge improperly denied the motion because it was legally sufficient, the state can still save the case from reversal by showing that the error was harmless beyond a reasonable doubt under the DiGuilio criminal harmless error standard. The opinion was divided with Chief Justice Muniz and Justices Canady and Grosshans joining Justice Couriel, with Justices Labarga and Polston dissenting in part and insisting that the “per se reversible” test is the proper test, and with newly-minted Justice Francis not taking part.

In Re: Amendments to the Florida Evidence Code (SC22-1040)—(9/8/22). AMENDMENT TO RULES OF EVIDENCE! The justices fast-tracked an amendment to the rules of evidence. This year, the Florida Legislature added section 90.2035, Fla. Stat., to the evidence code. That statute allows courts to take judicial notice of information from web mapping services, global satellite imaging sites, or Internet mapping tools. Google maps, etc. In civil cases, a party may object, but there is a presumption that that information is proper for judicial notice. If the court overrules an objection, it must admit the evidence in a civil case, but in a criminal case, the judge must instruct the jury that they may or may not accept the evidence as conclusive. The court adopted the rule as procedural and is retroactive to the date the amendment became law, but the court allowed 75 days for comment. (The court goes through this process of essentially confirming the legislature’s amendments to the evidence code because procedural rules are controlled by the courts, not the legislature, and the court is guarding its authority over the rules.)

**First DCA**

Jamerson v. Dixon—Per Curiam. This one-paragraph opinion had an interesting bit of dicta. Jamerson tried to appeal the dismissal of his complaint even though the dismissal was without prejudice. The general rule is that an order dismissing a complaint without prejudice is not appealable. The DCA added a bit of dicta, however, that such orders *are* appealable if it is “clear from the context of the record that the plaintiff’s right to pursue the case requires the filing of a new case.” In such a situation, the order is final and appealable. There was nothing in the record to indicate that Jamerson could not just amend his complaint in his current case, however, so the appeal was dismissed.

**Second DCA**

GCTC Holdings, LLC v. TAG QSR, LLC—(C.J. Morris; 2DCA; 9/9/22). GCTC owns a commercial shopping center, and it was trying to evict some of the shops owners for failure to make payments on their leases. The shops filed counterclaims. During discovery, the shops sought GCTC’s monthly rent rolls for all of the shops in the strip mall. They sought not just the rent rolls for all of the other shops, but asked GCTC to identify the shops by tenant name, location, square footage, amounts billed, monies collected for each unit by month, and to identify all vacant units and include square footage of each vacant unit. GCTC objected that the request was overbroad and not calculated to lead to discoverable information. It also objected that the information was privileged and covered by trade secret protection. The shops filed a motion to compel the discovery, and the trial court denied the motion on the basis that it was overbroad, but it did not rule on the trade secret question. The shops filed a motion for reconsideration, stating that they could obtain all of this information simply by being provided the leases for every shop and the records showing when tenants vacated the leased premises. They argued that the discovery was critical to their ability to present evidence of the vacancy rate change. The shops requested all leases with redactions to protect the vendors’ privacy. The trial court granted the motion for reconsideration and compelled all of the leases. GCTC filed a petition for a writ of certiorari. The well-settled standard is that GCTC had to demonstrate that the discovery order departed from the essential requirements of law that caused a material injury to the petitioner that would persist throughout the remainder of the proceedings below and effectively leave no adequate remedy on appeal. Trade secrets are protected under section 90.506, Fla. Stat. There is a three-step test for discovery of alleged trade secrets. First, is the sought information a trade secret? An *in camera* review is usually appropriate. Second, if the answer is “yes,” the court must evaluate whether there is a “reasonable necessity” for seeking the requested information, balancing the movant’s need with the opposing party’s need. Third, if production is reasonably necessary, the court should determine what safeguards (such as a confidentiality order) should be put in place to protect the information. The trial court must make findings to support its determination. Failing to do so can constitute a departure from the essential requirements of law because it thwarts appellate review. The DCA noted that it frequently grants cert petitions where the lower court skips the first step—conducting the *in camera* review—and fails to make findings on the 3-part test. The trial court completely skipped over the trade secret argument, ruling only on the claim of overbreadth. The language allowing redaction of the tenants’ private information did not save the order. The language about redaction was for tenant’s privacy, not GCTC’s privacy. Failure to evaluate the claim of trade secret departed from the essential requirements of law. Discovery order quashed.

**Third DCA**

Belvant v. Cohen-(J. Scales; 3DCA; 9/7/22)-Cohen succeeded in vacating a prejudgment writ of replevin obtained by Belvant. Based solely on that win, the trial court awarded attorney’s fees and costs. Section 78.20 provides that when “property has been retained by, or redelivered to, defendant on his or her forthcoming bond or upon the dissolution of a prejudgment writ and defendant prevails,” the defendant can get fees and costs for prevailing. The DCA held that fees could not be awarded just for getting the order vacated, however. Instead, the defendant has to then go forward and prevail in the underlying action for replevin, which was still pending. This is also the rule in the Fourth and Fifth DCAs, but the court certified conflict with a 1991 decision from the First DCA.

Homeowners Choice Property & Casualty Insurance Company v. Fraser et al—(J. Bokor; 3DCA; 9/7/22). Under Rule 9.110(k), an appeal of a declaratory decree by the trial court was premature. It was a non-appealable non-final order. The insurer brought three interrelated claims (declaratory judgment, fraud in the inducement, and breach of contract) that relied on the same facts and the same basic legal question (whether they were required to pay or deny the insureds claim within 90 days by both Florida law and the insurance policy). The lower court resolved the breach of contract question at summary judgment in favor of the homeowners but did not resolve the other claims. The insurer appealed. A partial final judgment is only appealable if it disposes of a “separate and distinct cause of action that is not interdependent with other pleaded claims.” To answer the question of whether a claim is separate and distinct, this three-part test is applied: (1) Could the cause of action disposed of by the partial summary judgment be maintained independently of the other remaining causes of action? (2) Were one or more parties removed from the action when the partial summary judgment was entered? (3) Are the counts separately disposed of based on the same or different facts? Because these claims were interrelated, the appeal was dismissed as premature.

Mikhaylov v. Bilzin Sumberg Baena Price & Axelrod, LLP—Mikhaylov sued his attorneys for malpractice for failure to adequately protect his business interests in a dispute with a business partner. The law firm moved to dismiss the malpractice claim on the ground that the statute of limitations had elapsed. Central to the disagreement was whether the statute of limitations period should be measured by the “final accrual rule” or, instead, the “first-injury rule.” Where an injury is caused, the statute starts running, but there is a special rule that applies when the plaintiff’s damages exist by virtue of an enforceable court judgment. In such a case, the statute of limitations does not begin to run until that judgment becomes final (which includes the conclusion of a direct appeal). That is called the “final accrual rule.” Mikhaylov argued that his legal malpractice case arose from the judgment against him, and the final accrual rule should be applied. The final accrual rule explains that a cause of action for legal malpractice does not accrue until the appeal of the judgment is concluded because “until that time, one cannot determine if there was any actionable error by the attorney.” The DCA refused to apply this established rule, however, under the facts of the case, because Mikhaylov was attempting to use the timing of his bankruptcy case, not the underlying case regarding the business dispute. The bankruptcy litigation was just an effort to mitigate the loss from the business dispute that had already occurred. The actual damage from the alleged malpractice was suffered more than two years prior to commencing the case. It accrued when Mikhaylov first suffered a concrete loss as the result of the malpractice, not when the bankruptcy proceedings concluded.

Najily v. Ortiz, etc, et al—Per Curiam. This citation PCA reminds us that whether a witness’s statement is one of fact or opinion is a question of law for the court and not a jury.

Quisenberry v. Bates-(J. Kuntz; 3d DCA; 9/8/22). In a dispute over legal fees, Attorney Bates made several attempts to serve a complaint upon Quisenberry, the former client. Attorney Bates then submitted a sworn statement for constructive service alleging that Quisenberry was hiding himself from service. A notice of action was issued that threatened a default judgment, and it was mailed to Quisenberry. It was also published in the Broward Daily Business Review for four straight weeks. A default judgment was entered. One year later, Quisenberry moved to vacate the clerk’s default and quash service of process arguing that constructive process by publication does not confer personal jurisdiction (and a breach of contract requires personal jurisdiction, not merely *in rem* or *quasi in rem* jurisdiction). Quisenberry pointed out that section 48.161 provides the proper method for serving process on someone who is concealing himself. While Attorney Bates agreed, he argued that Quisenberry waived the right to challenge service of process or personal jurisdiction by avoiding personal service and failing to timely respond to the notice of action. The trial court denied the motion to vacate. Quisenberry appealed. The Third DCA found that any attempt to avoid service of process was irrelevant. Constructive service by publication was not a proper way to serve a defendant in a breach of contract case. Thus, the “service of process, and the resulting default, are void and ‘constitutionally deficient.’” Accordingly, the DCA reversed the denial of the motion to vacate and quashed the clerk’s default judgment. The case was remanded for further proceedings to allow Attorney Bates the opportunity to serve Quisenberry in accordance with Florida law.

Singer v. Singer-J. Kuntz. This isn’t a personal injury appeal. It’s just a good reminder to do something nice for your spouse if you have one. The Third DCA noted that this appeal was “at least…the **twenty-sixth appellate case** in this Court that arises from the marital dissolution matter” involving the Singers. That’s right. They’ve appealed in their divorce case 26 times. The former wife and former husband both appeared *pro se*. And believe it or not, the appeal had merit. The wife—who was the appellant—prevailed in demonstrating that the trial court erred in awarding the husband attorney’s fees without allowing her to challenge his entitlement to fees. Reversed and remanded to allow the wife to fight her former husband’s right to fees and for a hearing on whether she is entitled to fees “as directed in Singer V.”

Varga, et al v. Dongal Investments, LLC—(J. Kuntz; 3DCA; 9/7/22). Varga and co-defendant Futaki were defendant/tenants in an eviction matter. A default judgment of eviction was entered against them. They moved to vacate the default judgment alleging mistake and excusable neglect under Rule 1.540(b)(1). They explained that a clerk “mistakenly calendared the deadline to answer on his own personal calendar rather than the law office calendar so that an answer could not be properly filed.” The deadline was not viewable to counsel and, as a result, the defendants’ response to the complaint was not filed. The clerk signed an affidavit to that effect. The defendants also served answers and affirmative defenses with the motion to vacate. The landlord/plaintiff did not respond. Nevertheless, the lower court denied the motion to vacate because defendants did not produce a witness for testimony or opportunity for cross-examination. There was a 15-minute Zoom hearing that was not transcribed, which “often dooms an appellant’s argument.” It was a non-evidentiary hearing, however, and the trial court’s order lacked consideration of any of the factors for vacating a default brought under Rule 1.540(b)(1) . Thus, the lack of a transcript was not fatal. A court must consider excusable neglect, whether there was a meritorious defense, and whether there was due diligence in seeking relief from the default. Thus, the order was reversed and remanded for consideration of the relevant factors.

White v. Autozone Investment Corporation-J. Gordo. Back in June, I summarized this case. The DCA held that section 11A-28(10) of the Miami-Dade County Code establishes a private cause of action to sue an employer for discrimination based on sexual orientation. White complained about verbal abuse at work due to his sexual orientation, he made a formal complaint to corporate office, was placed on leave pending investigation, and was then fired. He filed a discrimination complaint with the Miami-Dade Commission on Human Rights and received a right-to-sue notice from the Commission giving him 90 days to sue, which he did. The trial court granted motion to dismiss, holding that code did not create a cause of action, but the DCA reversed, allowing the suit to go forward. This week, the DCA denied rehearing, rehearing en banc, and certification, but the court did withdraw its opinion and substitute a new opinion in its place. The court still holds that the Miami-Dade County Code establishes a private cause of action for sexual-orientation discrimination, but it seemed to write to address the city’s arguments that precedents appeared to command a different result. First, the court agreed that no other DCA had explicitly addressed whether the ordinance created a private cause of action after its amendment. Second, the DCA agreed that it had “PCAd” a prior decision that the code created no private cause of action. The court noted, however, that a PCA has no precedential value. Finally, the Court also agreed that in 2002, it had held that the city code did not create a private cause of action, but the court distinguished its precedent on the ground that the code had been amended in 2006 in a way that changes the result. The code expressly added an “enforcement by private persons” section. Thus, the plaintiff still prevails.

**Fourth DCA**

Auguste v. Hyacinthe—(J. Conner; 4DCA; 9/78/22). What, pray tell, is the ecclesiastical abstention doctrine!? After the pastor of a Ft. Lauderdale church died in 2014, the church membership and board of trustees divided into factions, and a powers struggle ensued. One faction sued the other under Florida statutes for improper removal of directors, holding secret meetings, and for conversion. Hyacinthe moved to dismiss, arguing that the ecclesiastical abstention doctrine (“EAD”) prohibited courts from resolving a religious matter. The EAD is rooted in the First Amendment’s Establishment and Free Exercise clauses. It prevents civil courts from deciding matters of theological controversy, church discipline, ecclesiastical government, or conformity of the members of the church to the standard of morals required of them. It is a question of subject matter jurisdiction. The EAD is not, however, unlimited. Civil courts can resolve disputes if it can apply neutral principles of law without resolving religious controversies. The court examined two federal decisions and the Fourth DCAs decision in the same case where church members were fighting over control of bank accounts. All three courts applied the EAD and declined to intervene because even though bank accounts were involved, there was no way to resolve the right to control the accounts without deciding which faction within the Church controlled the accounts, and a church’s internal governance structure is manifestly ecclesiastical. The DCA distinguished those cases, though, on the ground that all the complaint asked for was an application of chapter 617 of Florida Statutes to the propriety of actions of the board of trustees, board of directors, or corporate officials of a corporation. Those are neutral principles of corporate law, not religious decisions. The claim of conversion was properly dismissed because it was premised on a right to control the Church and its property. With respect to the allegations of violations of Chapter 617, however, the EAD did not apply, and the DCA reversed and remanded. Unusually, the court left open the question of whether the church could shore up its claims that the EAD applied, leaving open the ability to claim EAD and show further facts in its answer or affirmative defenses.

Estate of Rosemarie Wolfe v. 224 Via Marila, LLC—(4DCA; 9/7/22). In this short opinion involving a confession of error, the DCA reminds us that an order awarding attorney’s fees predicated on a final judgment that is later reversed or vacated must also be reversed.

**Fifth DCA**

Cleveland Wellness Medical LLC v. Direct General Insurance Company—(J. Harris; 5DCA; 9/9/22). This is yet another opinion confirming that a judge cannot rely on a defendant’s citation to a default judgment from another case in granting a motion to dismiss a complaint where that default judgment is not attached to the complaint or incorporated by reference into that complaint. Instead, the court can only look to the four corners of the complaint. Reversed and remanded.

Gracia v. Security First Insurance Company—(5DCA; 9/9/22). Security First issued a homeowner’s policy to Gracia, and she reported a loss due to roof damage from a storm. Security First paid out $11,000 in damages, but then Gracia submitted a sworn proof of loss for a higher amount of damages. Security First refused to pay higher damages, and Gracia sued. In her deposition, Gracia claimed that an inspection from the year prior to buying the insurance and two years prior to the storm showed that the roof was in good condition and that “everything was good.” That turned out to be untrue. The pre-storm inspection showed damages. Security First moved for summary judgment on a defense of concealment or fraud, arguing that Gracia’s fraudulent attempt to pass off pre-storm damage as a covered loss should result in forfeiture of coverage. Gracia responded that she thought the pre-storm inspection showed different damages than what occurred after the storm, and just because the pre-storm inspection existed, it did not mean she understood it all and intentionally tried to mislead anyone. The trial court opined that under Florida’s new summary judgment standard, it was entitled to “weigh the credibility of the evidence presented,” which is simply incorrect. The judge essentially found that he did not believe Gracia and granted summary judgment for the insurer. On appeal, the DCA observed that the law regarding summary judgment only allows a judge to decide fact issues if no reasonable jury could return a verdict for the non-moving party. All genuine issues of material fact are jury issues. The judge could only make a credibility call if the party’s claim was conclusively rebutted by something unimpeachable like a video. The insurance company did not rebut Gracia’s claims that her statements were not made with an intent to mislead and that the claims were not material. These were fact issues for a jury. The record did not blatantly contradict her claims. The court noted that there is no element of intent to mislead when an insurance company claims that an insured made a false statement in order to gain coverage (because the insurer extended coverage based on mistaken facts). The intent to mislead is an element in deciding whether the insured should be denied post-loss coverage for, basically, insurance fraud. Judges Evander and Cohen concurred with the *per curiam* opinion, and Judge Eisnaugle CONCURRED IN RESULT ONLY WITH AN OPINION. Judge Eisnaugle wrote a shorter opinion, stating that the only question was not delving into the difference between pre and post coverage misleading statements. Instead, the only issue was that the judge made a credibility call on a genuinely disputed issue of fact. The question of whether she intended to mislead was an obvious jury question, but there was also a genuine dispute as to whether the statements were even false given how vague her statement was (that everything “was good” with the roof prior to the storm) and that the photos from the pro-storm inspection and the descriptions in the report were difficult to decipher. Reversed and remanded.