**TERRY’S TAKES**

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

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**Supreme Court of the United States**

Dobbs v. Jackson Women’s Health Organization—J. Alito. Like a few of the cases in this week’s summary, this is not a personal injury decision. As it will be taught in law schools, however, I decided to summarize it. The main point is that Roe v. Wade and Planned Parenthood v. Casey are overruled, with the majority holding that the “Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision.” Justices Barret and Gorsuch are the only two who joined the opinion in full without also offering some sort of concurrence, but the opinion was joined by Kavanaugh and Thomas, and Chief Justice Roberts concurred in the result. Justice Alito distinguished abortion from other privacy or liberty cases involving rights to intimate sexual relations, contraception, and marriage, writing that “abortion is fundamentally different…because it destroys what those decisions called ‘fetal life’ and what the law now before us describes as an ‘unborn human being.’” Justice Alito writes that *stare decisis* did not command unending adherence because “Roe was egregiously wrong from the start,” and it did nothing to end the controversy about abortion. The court returned power to legislate about abortion to the states. Justice Alito writes that application of *stare decisis* must involve analysis of the question of whether the original decision was correct. Justice Alito criticized Roe’s failure to identify a specific source for the right to abortion, but noted that Casey grounded the right in the due process clause of the Fourteenth Amendment. Before attacking that conclusion, Justice Alito seemed to offer an advisory opinion that the right to “equal protection” could not provide a new source for a right to abortion. He rejected any notion that abortion laws were a sex or gender-based right entitled to intermediate scrutiny because he viewed the goal of abortion as protecting fetuses of all genders, not regulating only on women’s rights. Justice Alito then extensively reviewed history and concluded that the right to abortion was not grounded in the Bill of Rights or firmly rooted in the nation’s history, so it could not be a “liberty” right. In regard to the decision to set aside *stare decisis* in this case, J. Alito noted that when the court misinterprets the Constitution, no one can correct the error but the court itself. The court noted scores of decisions where the court overruled itself on a Constitutional matter. The court applied a five-part test to overrule Roe and Casey: the nature of their error, the quality of their reasoning, the “workability” of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance. (It should be noted that only three justices—Alito, Gorsuch, and Barrett—appeared to embrace this five-part test). Going forward, any challenge to abortion will be evaluated under a “rational basis” standard. J. Thomas CONCURRED SPECIALLY for a very different reason. He opined that “substantive due process” under the Fourteenth Amendment is an “oxymoron,” and that “[b]ecause the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.” This is one day after he signed on to an opinion expanding the substantive due process rights of gun owners under the Fourteenth Amendment. He called upon the court to “reconsider all of this Court’s substantive due process precedents, including Griswold, Lawrence, and Obergefell.” Notably absent from his list of offending privacy/liberty decisions is Loving v. Virginia, 388 U. S. 1 (1967). Justice Kavanaugh CONCURRED SPECIALLY to note that people on both sides of the issue act in good conscience, but that the Constitution “does not take sides on the issue of abortion.” He offered an advisory opinion that any attempt to argue that the Constitution affirmatively prohibits abortion would be wrong. He agreed that Roe was wrongly decided, but conceded that whether to overrule it or, instead, to apply *stare decisis* was a harder question. He noted that every current member of the court and every justice since Justice Taft had voted to overturn constitutional precedent. Instead of applying the five factors of the majority, he applied the three-part test for overruling Constitutional cases where (i) the prior decision is not just wrong, but is egregiously wrong, (ii) the prior decision has caused significant negative jurisprudential or real-world consequences, and (iii) overruling the prior decision would not unduly upset legitimate reliance interests. Under factor two, he noted that Roe distorted the view of the court’s role and was an act of raw judicial power. In regard to the third factor, he noted that “tens of millions of Americans—and the 26 States that explicitly ask the Court to overrule Roe—do not accept Roe even 49 years later.” He conceded that Casey complicated things. He expressed respect for the aim of the Casey plurality to end the abortion debate, but concluded that their “well-intentioned effort did not resolve the abortion debate. The national division has not ended.” He took pains to echo Justice Alito’s statement that overruling Roe does not mean the overruling Griswold v. Connecticut, 381 U. S. 479 (1965); Eisenstadt v. Baird, 405 U. S. 438 (1972); Loving v. Virginia, 388 U. S. 1 (1967); and Obergefell v. Hodges, 576 U. S. 644 (2015), and does not threaten or cast doubt on those precedents. (Unlike Justice Thomas, he included Loving in the list of famous privacy/liberty cases). He also offered advisory opinions, opining that a State could not, as a result of this opinion, bar a resident of that State from traveling to another State to obtain an abortion because such a law would violate the constitutional right to interstate travel. He opined that a State could not retroactively impose liability or punishment for an abortion that occurred before today’s decision takes effect in light of the due process and *ex post facto* clauses. Chief Justice Roberts CONCURRED SPECIALLY, agreeing with the result with respect to the Mississippi 15-week abortion ban, but he disagreed with overturning Roe and Casey. He noted that Mississippi had only asked for the court to throw out Casey’s “viability” standard (as 15 weeks is prior to viability), not overturn Roe. He would have taken that more measured course of holding that a woman’s right to choose was guaranteed long enough to make the choice about abortion, but not all the way to viability. He would have guaranteed six weeks of time to make such a choice, citing a source for the proposition that most women know they are pregnant by the six-week mark. Justices Breyer, Sotomayor, and Kagan filed a joint DISSENT lamenting the blow to women’s rights and the loss of Roe and Casey’s attempt to strike a balance between the right to choose and the state’s interest in protecting fetal life after viability. In regard to the future implications of the majority’s decision, the liberal bloc did not buy the protestations of Justices Alito and Kavanaugh that striking down Roe and Casey would not affect other privacy/liberty decisions. They write, *“And no one should be confident that this majority is done with its work. The right Roe and Casey recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See Griswold v. Connecticut, 381 U. S. 479 (1965); Eisenstadt v. Baird, 405 U. S. 438 (1972). In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See Lawrence v. Texas, 539 U. S. 558 (2003); Obergefell v. Hodges, 576 U. S. 644 (2015). They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does casts doubt on precedents that do not concern abortion. But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not ‘deeply rooted in history’: Not until Roe, the majority argues, did people think abortion fell within the Constitution’s guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, there was no support in American law for a constitutional right to obtain contraceptives. So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority’s opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.”* The dissenters write that Roe and Casey is a bedrock principle embedded in American jurisprudence and relied upon by millions of women, and excising it is devastating. The dissenters call attention to the gun rights decision in New York State Rifle & Pistol Assn., Inc. v. Bruen issued one day earlier that condemned relying on remote history and expressed a preference for relying on history around the date of the Bill of Rights or the adoption of the Fourteenth Amendment, and the dissenters noted that abortion was only criminalized in 1791 after the “quickening” of a fetus (the time at which fetal movement was detected). The dissent notes that contrary to the claim of the majority, *“‘people’ did not ratify the Fourteenth Amendment. Men did.”* The dissent charged that the men who passed the Fourteenth Amendment were not attuned to women’s rights. The dissenters reject a view of the Constitution that is stuck in the past and that relies on practices in 1791 or 1868, arguing that the *“Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning.”* The court *“has kept true to the Framers’ principles by applying them in new ways, responsive to new societal understandings and conditions. Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of ‘liberty’ and ‘equality’ for all.”* This does not invite judicial activism. The dissenters argue that *“applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents.”* Instead of looking to 1791, the dissenters argue that each generation should build not upon “original intent,” but should build on the court decisions of each preceding generation and that proper Constitutional interpretation should gain *“content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution’s most fundamental commitments to new conditions.”* The dissenters scorn Justice Kavanaugh’s opinion that he is “neutral” on abortion, stating that elimination of a right held by women for 50 years in favor of state’s rights to ban the right is one-sided. *“His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being ‘scrupulously neutral’ if it allowed New York and California to ban all the guns they want? If the Court allowed some States to use unanimous juries and others not? If the Court told the States: Decide for yourselves whether to put restrictions on church attendance?”* The dissent notes that women were not afforded the right to choose in 1791 because they were not seen as equal and had no right to vote. The dissenters distinguish other decisions where *stare decisis* was set aside, and they rebut the majority’s claims that Roe and Casey were wrongly decided, unworkable, and not relied upon. The dissenters argue that the fact that abortion and Roe are still controversial is not a basis for ignoring *stare decisis*, pointing out that abortion was a contentious issue at the time of Roe and Casey and that nothing has changed in that respect. Finally, the dissenters note that the controversy over abortion is the exact reason to stick to *stare decisis*, which is what Casey did. Instead of weighing in on the debate, the Casey court upheld Roe not because the Casey court thought that Roe was “correct,” but, instead, out of a desire to let the decision stand and not reopen the debate. The dissenters note that several states passed new laws recently specifically due of the change in composition of the court, which was a dangerous invitation to abandon precedent based on a changing court—an invitation the majority accepted. The dissenter4s warned that overturning Roe when the only thing that had changed was the identity of the justices would increase the perception of the court as a partisan institution, not a “neutral” one.

Nance v. Ward—J. Kagan. This is not a personal injury case, but it is a section 1983 case. Chief Justice Roberts and Justice Kavanaugh joined the liberal justices in holding that section 1983, which plaintiff’s lawyers usually think of as a method for suing for money damages for constitutional violations, also authorizes a death row inmate to sue to force a state to provide an alternate method of execution used by another state if the method will be cruel or unusual in his case. Nance opined that death by lethal injection would cause him inordinate pain, and he requested death by firing squad, which is authorized in four states but not currently authorized under Georgia law (where he was convicted). The court applied what appears to be a new rule that 1983 claims will be well-received by the Supreme Court as long as the relief sought is death by firing squad instead of money. Still, Justices Barret, Alito, Thomas, and Gorsuch dissented, opining that the inmate improperly raised his claim and should be put to death by lethal injection because he should have raised his claim as a habeas corpus claim, not a 1983 claim.

New York State Rifle & Pistol Assoc. Inc., et al v. Bruen-J. Thomas. This opinion does not directly impact personal injury law, but it is significant enough that it will be taught in law school. The Supreme Court held that the Second Amendment (applicable to the states via the due process clause of the Fourteenth Amendment) guarantees most citizens the right to carry a handgun outside of the home without need of demonstrating a special need for self-defense. The court struck down a 115-year history of New York regulation of personal firearms carried in public. Six states and D.C. required citizens to show a special need for a concealed carry permit, whereas 43 states issue them without showing any special need, and Vermont has no permitting system at all. The minority states were called “may issue” states, and other 43 are termed “shall issue” states. In the years since Heller and McDonald held a right to guns for self-defense in the home, the Courts of Appeals have coalesced around a “two-step” framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. Justice Thomas writes: “Despite the popularity of this two-step approach, it is one step too many.” The Court ordered that lower courts look only to history, and they may not balance the government’s interest in the gun restrictions against the citizen’s right. Only if a firearm regulation is consistent with this nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command” to allow a citizen to bear arms. In the majority’s view, New York could not meet that test. The court clarified that the Second Amendment does not protect a right to “dangerous and unusual weapons,” only weapons “in common use at the time,” and Justice Thomas the majority reasoned that handguns are in common use, not unusual in the modern day (though they were, of course, not in common use in 1791). In looking to the history, Justice Thomas shrugged off history of gun regulation in the years after adoption of the Fourteenth Amendment even though the Fourteenth Amendment is what makes the right applicable against states, and the court instead stated that they would just look to the understanding of what the Second Amendment meant in 1971 (even though, without the Fourteenth Amendment, there was absolutely no constitutional right appliable against the states in 1791 and even though modern handguns did not exist in 1791). Justice Thomas wrote that it was still accepted that governments could prohibit the carrying of firearms in “sensitive places” such as schools, government buildings, legislative assemblies, polling places, and courthouse like the ones where the justices work. Justice Alito SPECIALLY CONCURRED, agreeing with the majority, but taking pains to argue with Justice Breyer’s dissent, which was concerned with gun violence and mass shootings. Justice Alito argued that bad people will use guns despite laws to the contrary, and so good people need guns to protect themselves if they want. Justice Kavanaugh and Chief Justice Roberts also CONCURRED SPECIALLY, joining the opinion in full but writing to note two limits on the decision (that are controlling given that two of the six justices in the majority backed the limits). The first limit is that states can still require concealed-carry licenses like the ones in 43 “shall issue” states. As part of the licensing requirement, states “may require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements.” Second, the Second Amendment still allows for gun regulation, particularly for the banning of unusually dangerous weapons not in common use, prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. Justice BARRETT CONCURRED SPECIALLY, lamenting that the majority opinion dodged espousing a coherent policy about how to apply history in cases involving both the Bill of Rights and the Fourteenth Amendment. She expressed a preference for the 18th century over that of the 19th century, and urged people not to read the majority’s discussion of 19th century history of gun regulation “to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.” Justice Barrett did not address the fact that prior to the adoption of the Fourteenth Amendment (and the judicial invention of incorporation theory in the 20th and 21st century), the Bill of Rights applied only to the national government, not state and local government, such that states in 1791 had unfettered rights to ban or restrict firearms. Justices Breyer, Sotomayor, and Kagan DISSENTED, lamenting that the Court is blocking states’ ability to fight the scourge of gun violence plaguing the country. Justice Breyer noted that there was no factual record below, he took issue with the court’s oversimplification of the seven “may issue” jurisdictions and 43 “shall issue” states, noted that the seven “may issue” states dismissed as outliers actually accounted for 25% of the nation’s population, and noted that “shall issue” states only became a thing in the 1980s. Breyer condemned the majority’s total reliance on history and complete discounting of the legitimate aims and need for the legislation, especially given the dense populations in the seven “may issue” states. Breyer noted that every circuit court had adopted the two-step approach rejected by the court. Breyer also noted that lawyers and judges would struggle to resolve all questions about modern guns by consulting history. Justice Breyer was unconvinced by the majority’s attempts to discount 700 years of gun and weapons regulation that existed in England, in the colonies, at the time of the Bill of Rights, and at the time of the adoption of the Fourteenth Amendment.

Vega v. Tekoh—J. Alito. This case presents the question of whether a plaintiff may sue a police officer under 42 U. S. C. § 1983, based on the allegedly improper admission of an “unMirandized” statement in a criminal prosecution. The case arose out of the interrogation of respondent, Terence Tekoh, by petitioner, Los Angeles County Sheriff ’s Deputy Carlos Vega. Deputy Vega questioned Tekoh at his place of employment and did not give him a Miranda warning. Tekoh was prosecuted, and his confession was admitted into evidence, but the jury returned a verdict of not guilty. Tekoh then sued Vega under § 1983, and the United States Court of Appeals for the Ninth Circuit held that the use of Tekoh’s un-Mirandized statement provided a valid basis for a § 1983 claim against Vega. Applying the semi-official doctrine of “we always reverse the Ninth Circuit,” the Supreme Court held that section 1983 does not authorize suits against police officers for failing to read Miranda Rights. The reason for this is that the Court now considers Miranda rights not to be a Constitutional “right;” rather, the Miranda warnings are a judge-created prophylactic measure created to safeguard the underlying Fifth Amendment right. Miranda is a constitutional “decision” that created a constitutional “rule,” but is not itself a constitutional “right,” so 1983 does not authorize a cause of action for violating Miranda.

**Eleventh Circuit**

Brucker et al v. City of Doraville—J. Brasher. Four plaintiffs accused the City of Doraville, Georgia, of violating their right to due process. Each of the four plaintiffs received citations from the City for traffic or property code violations, were convicted of those violations, and were ordered to pay fines and fees by the municipal court. They sued under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, alleging that this process presented an unconstitutional risk of bias because the City’s budget heavily relies on fines and fees, and this reliance could encourage the judge, prosecutor, and law enforcement agents—all paid by the City—to overzealously enforce the law. The upshot of this risk of bias, they contended, was that the City’s financial dependence on fines and fees is unconstitutional. The court disagreed, recognizing that while it may be unwise for a government to rely on fines and fees to balance its budget, the importance of fines and fees to a city’s budget does not make its procedures for imposing fines and fees unconstitutional. The court declined to view the fining scheme as a system, instead viewing how the judge, prosecutor, police, and code enforcement—when viewed separately—do not control enough of the system or reap enough separate rewards to create a risk of bias. Judge Newsom CONCURRED SPECIALLY, noting that the facts of this case did not demonstrate bias, “but in a different case, with different facts, I might well reach a different decision: If a municipality heavily dependent on fines and fees employed a judge who not only was reliant on the city for his salary but also was terminable at will, the judge’s precarious position probably would, in my mind, give rise to an unconstitutional ‘possible temptation’ to bias.”

Fuerst v. The Housing Authority of the City of Atlanta, Georgia—C.J. Branch. By its plain text, the National Defense Authorization Act (“NDAA”), 41 U.S.C. § 4701 et seq., protects employees of federal contractors, subcontractors, grantees, and subgrantees or personal services contractors from their employers’ retaliation for disclosing information that the employee reasonably believes to be evidence of gross mismanagement of a federal contract or grant, an abuse of authority related to a federal contract or grant, or a violation of a law, rule, or regulation pertaining to a federal contract or grant. 41 U.S.C. § 4712(a)(1). Nevertheless, Ms. Fuerst, an attorney employed by the NDAA, was fired after she challenged the negotiation tactics of AHA’s new CEO, Catherine Buell. She then filed complaints alleging retaliation with the Department of Housing and Urban Development (“HUD”) inspector general and the United States District Court for the Northern District of Georgia, but both were dismissed for failure to state a claim under the NDAA. The lower court held (1) that § 4712 did not apply to Fuerst as an employee of a federal “grantee,” and (2) that Fuerst merely alleged a difference of opinion with her employer, not a specific violation of a contract or grant. On appeal, the Eleventh Circuit agreed with Fuerst that she fell within the class of disclosing persons protected by § 4712, and held that the district court erred in concluding otherwise. The Eleventh Circuit agreed with the district court, however, in holding that Fuerst’s belief that Buell’s actions evinced gross mismanagement was not reasonable. Fuerst failed to show that she had a reasonable belief that Buell’s actions constituted an abuse of authority or a violation of a law, rule, or regulation. Thus, her firing was not retaliation under the NDAA.

**First DCA**

Main Street Entertainment, Inc. d/b/a Potbelly’s v. Guardianship of Jacquelyn Anne Faircloth—on a motion for rehearing or certification, the First DCA agreed to certify the following question to the Supreme Court of Florida: WHETHER THE COMPARATIVE FAULT STATUTE, SECTION 768.81, FLORIDA STATUTES, APPLIES TO TORT ACTIONS INVOLVING THE DRAM-SHOP EXCEPTION CONTAINED IN SECTION 768.125, FLORIDA STATUTES, AGAINST A VENDOR WHO WILLFULLY AND UNLAWFULLY SOLD ALCOHOL TO AN UNDERAGE PATRON, RESULTING IN THE PATRON’S INTOXICATION AND RELATED INJURY? As a side note, the bar in this case is one block from the FSU College of Law. Looking back at the opinion from February 2022, the First District had reversed judgment for the plaintiff and a 28-million-dollar verdict and remanded for a new trial because Potbellies “should have been allowed to assert a comparative fault defense as well as the so-called ‘alcohol defense.’” This was a case where a drunk driver struck a drunk pedestrian causing catastrophic injuries. Both the driver and victim were underage and had been served alcohol by separate bars. The driver was served by Potbellies where he had been employed, so they had good cause to know he was under 21. Potbellies wanted to assert that the pedestrian’s own intoxication contributed to the accident and injuries. The February opinion summarized the dram shop statute, emphasized that the statute does not create a cause of action, clarified that the true cause of action is a negligence claim, and held that the cause of action is not an intentional tort claim despite the “willful and unlawful” language in the dram shop statute. This was critical because comparative negligence can be alleged in a negligence case, but it cannot be raised as a defense to an intentional tort. To make things more complicated, however, the comparative negligence theory in this case could not be asserted against either the driver or the pedestrian. Because liability under the dram shop statute is “derivative liability,” Potbellies would be liable for 100% of the harm caused by the driver and could not reduce its liability by proving negligence of the driver or negligence of the pedestrian. Cantina 101 would likewise have derivative liability for 100% of the pedestrian’s negligence if a jury finds any comparative negligence. Potbelly’s WAS entitled to have the jury apportion blame between itself and the driver on one hand and the **bar that served the pedestrian** (Cantina 101) on the other hand. The court also summarized the “alcohol defense” of section 768.32(2), Fla. Stat., which bars a plaintiff from recovery if they were drunk and more than 50% liable for their own harm. Because the trial court thought that the action was an intentional tort rather than a plain negligence claim, it thought that comparative negligence could not be asserted by a defendant and it also concluded that because the alcohol defense smacked of comparative negligence principles, the jury could not be instructed on that defense either. The First DCA held, though, that the Defense was entitled to an alcohol instruction because it was an ordinary negligence case, and the statute would apply even if the case were an intentional tort, because the language of the statute states that it applies to “any civil action.” Then the court stated,

Nonetheless, it is unclear to us that Potbelly’s would have actually benefitted from the alcohol defense, regardless of the trial court’s incorrect reason for denying it. The statute disallows liability if the plaintiff, due to intoxication, was “more than 50 percent at fault for his or her own harm.” To the extent that the harm to Faircloth was the result of her own intoxication caused by Cantina 101 serving her alcohol, she was not “at fault” for such. Cantina 101 was. Again, in this situation her fault would be attributed to Cantina 101 because they are derivatively liable for it. Under this scenario, the alcohol defense would not disallow recovery even if Faircloth’s intoxication was more than 50 percent the reason for her harm.”

The court left open the possibility that the plaintiff/pedestrian was liable for her own harm **for reasons other than intoxication**. Judge Osterhaus concurred with Judge Winokur’s opinion, but Judge Makar wrote an 18-page opinion (nearly double the length of Judge Winokur’s) arguing that the trial court was correct in finding that the tort was an intentional tort, not an ordinary negligence case, and that comparative negligence could not be raised as a defense, because the statute required that the plaintiff proved that serving the underage patrons was “willful.” Likewise, Judge Makar would have disallowed an alcohol defense, finding the statute disallowing comparative negligence for an intentional tort to be considered by a jury was applicable.

**Second DCA**

Andary v. Walsh—in this medical malpractice case, the Second District granted Dr. Andary’s petition for a writ of certiorari. The doctor had moved to dismiss the complaint, the trial court denied the motion, and the appellate court quashed that order, essentially granting dismissal. The basis for the doctor’s argument was a defect in the plaintiff’s presuit letter. While denial of a motion to dismiss cannot ordinarily be reviewed via a petition for certiorari, there is an exception when the presuit requirements of a medical malpractice statute are at issue. Section 766.203(2), Fla. Stat., requires that corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant's submission of a “verified” written medical expert opinion from a medical expert as defined in s. 766.202(6). The plaintiff did obtain a corroborating letter from a doctor of internal medicine at Washington University. Section 92.525, Florida Statutes (2020), sets forth the particulars of what makes a document "verified." Basically, the requirement that a document be verified means that the document must be signed or executed by a person and that the person must state under oath or affirm that the facts or matters stated or recited in the document are true, or words of that import or effect. There are a few alternate ways of verifying a document under the statute, none of which were at issue in the case. The doctor’s letter in this case was notarized, but his statement was not made under oath. He also did not affirm that his opinion was true. Thus, it was not “verified,” and the doctor was entitled to dismissal.

Robinson Helicopter Company, Inc. v. Gangapersaud—J. Stargel. The Second District granted rehearing, specifically noted the involvement of the Florida Justice Association as an amicus, withdrew its opinion from January, and entered a substituted opinion. Nevertheless, the helicopter company still won the appeal on the ground that the trial court erred in finding that it had personal jurisdiction over the corporation, which was based in California. A dentist-pilot was forced to make a landing due to engine failure, and he landed near Tampa. Robinson Helicopter Company (“Robinson”) was the manufacturer of the helicopter, and when a local maintenance company contacted them, Robinson shipped a replacement fuel pump and instructed the company on how to repair the aircraft. The repair seemed to work, and the maintenance company was set to fly the helicopter to its shop for further repairs. During the flight, the engine failed again, and the pilot had to land in a busy Tampa intersection. During landing, part of the rotor struck a utility pole, a piece of it broke off, and the piece shot through the windshield of a truck, killing the passenger and injuring the driver. The amended complaint asserted claims against Robinson for strict liability and negligence based on a defective air inlet duct (which caused the engine failure), and the plaintiff asserted a separate negligence claim for failing to properly diagnose, repair, and transport the helicopter. Plaintiffs argued that Florida’s long-arm statute, section 48.193, allowed it to sue a California corporation doing business in Florida because Robinson was a nonresident that committed "a tortious act within this state" and because the helicopter was manufactured by Robinson and caused injury within the state. On appeal, the DCA distinguished between general and specific jurisdiction. It reminded us that jurisdiction over a nonresident is evaluated under the two-step test set forth in Venetian Salami Co. v. Parthenais, 554 So. 2d 499 (Fla. 1989). First, the court must determine whether the operative complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the long-arm statute. Then, if it does, the next inquiry is whether sufficient “minimum contacts” are demonstrated to satisfy due process requirements. In regard to whether Robinson committed a tortious act in Florida, it did not. Everything it did, it did in California. It had no business representatives in Florida. While telephonic or electronic or written communications can be deemed to occur in Florida, that rule only applies when the tort involves some sort of communication directed into Florida “for purpose of fraud, slander, or other intentional tort,” ordinary negligence committed by a phone call from outside Florida doesn’t meet the test. The Court noted that there was one First DCA case applying the long-arm statute to an out-of-state neurologist for medical malpractice, but the Second DCA distinguished that case on the basis that the doctor in that case affirmatively reached out to the plaintiff to discuss the surgery he recommended, whereas in the instant case, Floridians reached out to Robinson and Robinson merely answered the phone calls. The court sided with plaintiffs on the second statutory basis, arguing that because Robinson manufactured the helicopter, even though they did not manufacture the specific malfunctioning part, the long-arm statute applied. But then came step two of the Parthenais test, the “minimum contacts” prong. Though there are three Robinson-authorized dealers and eleven authorized service centers in Florida, they manufacture only about 50 helicopters a year, sold the helicopter in question in Indiana, and conduct no advertising in Florida. This was deemed insufficient to establish “minimum contacts,” as due process requires that the defendant's relationship with the forum state "must arise out of contacts that the 'defendant himself' creates with

the forum State." Reversed and remanded with instructions to dismiss Robinson from the case, though the case will proceed against the Florida maintenance company.

**Third DCA**

Andreasen v. Klein, Glasser, Park & Lowe, P.L., etc., et al.—J. Bokor. Wrongful death suit. The trial court dismissed it. In 2008, an uninsured motorist collided with a car driven by John Andreasen, rendering John permanently disabled. After several years of litigation against both his insurer (for allegedly failing to allow stacking of his uninsured motorist coverage) and his own former counsel (for allegedly failing to competently litigate his claims against the insurer and eventually allowing the claims to lapse), on March 10, 2019, John committed suicide. Personal representative (“PR”) for the estate, the decedent’s brother, sued some of his brother’s former attorneys for wrongful death, alleging that the negligence and malpractice was a cause death because allowing stacking of coverage to lapse left decedent in unendurable pain and suffering. The Third DCA affirmed that “the complaint was properly dismissed because John’s counsel did not have a legal duty to prevent his suicide.” There can only be proximate cause for suicide if the party had control over the actions. “Here, the complaint made no allegation that John’s attorneys were aware he was suicidal or, more importantly, that the attorneys had any duty, obligation, or legal ability to exercise any supervision or control over his daily activities during the period they were representing him. In any case, while the district courts have found that medical professionals may in some circumstances have a duty to intervene if they become aware of a potentially suicidal patient, no state court has extended a similar duty to attorneys, and we decline to do so here.”

Sacramento v. Citizens Property Insurance Corporation—summary judgment was reversed on the ground that it was entered prematurely. Plaintiff’s discovery efforts—including depositions—were delayed due to COVID, and plaintiff asked that SJ hearing be delayed until a key depo took place. “Citizens argues summary judgment was proper because no formal motion for continuance was filed. While it would have been better practice for the Sacramento’s’ attorney to file a written motion for continuance, we find his response to the summary judgment motion and phone call to opposing counsel asking to reset the hearing while the deposition of a key witness had already been noticed during the COVID-19 pandemic sufficient to find entry of summary judgment” was premature. The court also noted that Citizens noticed one of the key plaintiff witnesses for deposition a week before the SJ hearing, which the court took as a tacit admission that that witness had key information that could have resulted in a material issue of fact. Citing 3d, 4th, and 5th DCA decisions, the court stated, “Florida District Courts agree that if there is a pending deposition that would most likely raise a genuine issue of material fact, discovery is considered ongoing and summary judgment is premature; this is especially the case if the deposition is noticed,” though summary judgment may be granted, even though discovery has not been completed, when the future discovery will not create a disputed issue of material fact. The trial court cannot simply ignore a pending deposition of a witness whose testimony would most likely raise a genuine issue of material fact.

Citizens Property Insurance Corporation, v Dasaro Enterprise, Inc., etc.—There was an invoice for $5,822.15 invoice that Dasaro, as the assignee of Citizens’ insured, sent to Citizens for emergency water mitigation services Dasaro provided at the home of Citizens’ insured. The policy had a limit of $3,000, however, which could only be increased if Citizens agreed to an increase within 48 hours of a request. Citizens sent a check to Dasaro for $3,000, not $5,822.15. Dasaro sued for the $2,822.15 difference, arguing that the invoice was a “request,” but the appellate court disagreed as it was sent after the services were rendered. The court also noted that even if the invoice could be considered a request to exceed the $3,000 cap, Citizens never “agreed” to the request within 48 hours. Judgment for Citizens.

City of Miami v. Elvis Cruz—J. Emas. Don’t mess with Elvis. Elvis Cruz alleged in a Complaint that the City of Miami breached a settlement agreement between the parties. The city filed a motion to dismiss, alleging that the Complaint was barred by sovereign immunity. An order denying a claim of sovereign immunity is one of the listed types of nonfinal orders that can be appealed. Citing a 1984 Florida Supreme Court case, the Third DCA held that Florida law recognizes a limited waiver of sovereign immunity where the municipality breaches an express written contract. For purposes of a motion to dismiss, the court had to take as true that the city had breached the agreement, so the court affirmed the denial of the motion to dismiss.

Escobar v. Marino--A party moving to set aside a default must show excusable neglect, a meritorious defense, and due diligence in moving to set aside the default. Escobar did not produce a transcript of the default hearing, facts were at issue, and the court affirmed based on the lack of a transcript.

Pineside Condominium Association, Inc. v. Rey—Rey sued Pineside Condo Association for failing to maintain the common areas of the condominium in which she resides, causing her damage. When Pineside did not timely answer, the trial court entered an order granting Rey’s motion for default judgment as to liability only. The trial court denied Pineside’s subsequent motion to set aside the default, and the court ordered that the case proceed to trial on damages. Pineside appealed, but the Third DCA dismissed the appeal for lack of jurisdiction. An order that finds liability only (not damages) was an appealable nonfinal order until the year 2000, but in that year, the Florida Supreme Court amended Rule 9.130. Since that time, orders determining the issue of liability only are not appealable until a final judgment has been entered.

Ramos v. Bastos, et al—C.J. Fernandez. This was an appeal from county court. At a dog groomer’s business, a client’s dog attacked plaintiff’s dog and injured its eye. The defendants were the grooming business and the operator of that business. They moved for summary judgment on the ground that plaintiff failed to name an indispensable party—the owner of the attacking dog. Such owners are strictly liable under sections 767.01 and 767.04, Fla. Stat. The trial court granted SJ to the defendants, plaintiff appealed, and the Third DCA reversed. Plaintiff **could have** sued the dog owner, but he **did not**. The dog owner statute states, “The remedy provided by this section is in addition to and cumulative with any other remedy provided by statute or common law.” The suit wasn’t about ownership of the dog; it was about the groomers’ own negligence. The suit can proceed without the bad dog’s owner.

Tallo v. Illes--Article I, section 23, of the Florida Constitution protects the financial information of persons if there is no relevant or compelling reason to compel disclosure. Prior to compelling financial disclosure from a nonparty in a postjudgment context, a court must hold a hearing, and when a judgment creditor seeks to discover the personal financial information of a nonparty, he or she bears the burden of proving that the information sought is relevant or is reasonably calculated to lead to the discovery of admissible evidence. In this case, the trial court entered a show cause order why the nonparty should not be sanctioned for failing to turn over the financial discovery, and she challenged the order by petition for certiorari. The petition quashed the order to show cause because the court did not hold a hearing.

**Fourth DCA**

Karisma Hotels & Resorts Corp. Ltd. V. Hoffman—The Fourth DCA recognized that the Supreme Court of Florida has amended Rule 1.280(h) to adopt the so-called “Apex Doctrine” prohibiting depositions of corporate higher-ups who have no special knowledge about a case. The Fourth DCA, however, found a corporate officer’s affidavit professing ignorance to be insufficient to avoid his deposition, denying the officer’s cert petition to quash a discovery order. An explanation of the relationship between the litigation and the officer’s apex position is necessary for the court to sufficiently evaluate the applicability of the officer’s personal knowledge. In relevant part, his affidavit only stated, “I lack unique or personal knowledge of the issues being litigated in this matter apart from the information provided in the numerous depositions taken of the current and past executives/representatives of Defendant, Premier Worldwide Marketing, LLC and Defendant, Premier Guest Services, LLC.” The court held that this “is the type of ‘bald assertion of ignorance’ disapproved by the Florida Supreme Court. The affidavit was insufficient, and the trial court did not depart from the essential requirements of law in compelling the deposition of the corporate officer.”

Pierre v. American Security Insurance Company—J. Gross. The trial court erred in dismissing a case based on plaintiff’s attorney failure to attend a case management conference. The plaintiff moved to set aside the dismissal based on mistake, inadvertence, or excusable neglect, which the trial court denied. The dismissal was announced in open court, but not e-served in writing to the parties. Five weeks later, plaintiff moved to set aside the dismissal, offering his assistant’s affidavit explaining that the attorney he had missed the conference due to a clerical error regarding the date that was attributable to a legal assistant at the plaintiff’s attorney’s firm. Judge Gross noted that a calendaring error by an attorney’s staff is one of the common reasons that relief is granted under rule 1.540(b)(1). The five-week period from the entry of the order of dismissal to the bringing of the motion to vacate was a “reasonable time,” especially where the order itself did not indicate that it was served upon the plaintiff by either email or mail. The trial court abused its discretion in refusing to set aside the order. The court distinguished and receded from (in part) a case where there was no affidavit regarding a clerical error and counsel took four months to file a 1.540 motion, noting that the case was not applicable to dismissal against a plaintiff rather than a defendant under any set of facts.

Total MD Orthopedics and Neurosurgery LLC v. Geico Indemnity Company—the court reversed and remanded a trial court’s order *sua sponte* transferring venue because there had been no showing that plaintiff’s chosen venue was improper or that transfer was appropriate on *forum* *non conveniens* grounds.