**TERRY’S TAKES**

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

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**2022 Week 41 (October 3-7, 2022)**

**Supreme Court of the United States**

There are no opinions yet, but a newsworthy voting rights was argued.

Merrill v. Milligan—Argued October 4, 2022. The issue was whether Alabama’s 2021 redistricting plan for its seven seats in the United States House of Representatives violates Section 2 of the Voting Rights Act for essentially race-based gerrymandering that results in a low share of majority-black districts relative to the black percentage of the state.

**Eleventh Circuit**

**The Eleventh Circuit had a busy week.**

A.L. et al v. Walt Disney Parks and Resorts U.S., Inc.—(J. Lagoa; 11th Cir.; 10/4/22). This case was actually a second appeal. In a prior case, the circuit affirmed in part and reversed in part the grant of summary judgment in favor of Disney. A.L. is an adult male with severe autism with the developmental age of between 5 and 7. He is represented by his mother as “next friend,” and the parent (“D.L.”) also brought claims. The court notes that this case is “one of over forty actions filed by plaintiffs with disabilities against Disney in Florida and California courts” alleging that Disney violated the Americans With Disabilities Act by failing to accommodate their requests to modify the parks to be more accessible to persons with disabilities. The opinion summarizes the various types of skip-the-line passes made available to disabled persons and the abuses of the passes that led to scrapping the system and replacing it with the Disability Access Service (“DAS”), which is meant to hold the place in line for disabled persons without requiring them to actually wait in line. After a bench trial, the district court held that the DAS passes provided A.L. with a similar “if not better experience” at the park than non-disabled visitors. Disney argued that further requested accommodations by A.L. were unreasonable. On appeal, the Eleventh Circuit noted that amusement parks are specifically listed as one of the types of places of public accommodation required to provide equal access to the disabled under the ADA. The court affirmed the findings that the existing accommodations are reasonable and that the requested modifications were not reasonable or necessary. Like the pre-2013 system, the proposed changes would be subject to fraud and abuse, and they would also result in longer wait times for other guests. It was also proper to consider that the requested accommodations would “fundamentally alter” Disney’s park operations and business to the detriment of the 96.7% of guests who do not have DAS cards. The court then turned to pretrial evidentiary rulings excluding witnesses and evidence listed just prior to trial (and after the prior remand in the case). Critically, A.L. failed to serve a written objection to the magistrate’s order barring him from deposing a neurologist. When a pretrial matter not dispositive of a claim or defense is ruled upon by a magistrate, the party has 14 days to object in writing and waives any objection if he fails to do so. A.L. complained that the ruling barring him from calling the neurologist at trial left him without an expert witness, but the circuit court had no sympathy in light of the fact that the expert was late-disclosed and discovery had been closed a long time prior to the trial. There was no “good cause” demonstrated to allow the calling of a new witness after trial had already begun. The case was seven years old, and the neurologist was listed less than 24 hours prior to trial beginning. Ruling in favor of Disney was affirmed.

<https://media.ca11.uscourts.gov/opinions/pub/files/202012720.pdf>

Holland v. Carnival Corporation—(J. Lagoa; 11th Cir; 10/4/22). This is an important reminder of the federal standard for pleading facts in addition to legal theories, and this case also is an important reminder of the difference between direct and vicarious liability. Carnival is a Panamanian corporation that has its principal place of business in Miami. Among its fleet of cruise ships is the Horizon. Holland, a passenger on the Horizon, slipped and fell while descending the glass stairs from Deck 5 to Deck 4 due to some wet or slippery transient foreign substance. He sustained serious injuries requiring surgery. He sued in the Southern District of Florida, alleging that Carnival had actual or constructive notice of the substance on the glass staircase. (Note: One has to wonder how a glass staircase on a ship is not the problem here.) The glass staircase was heavily trafficked by passengers and crew including people who carried drinks. Holland’s complaint asserted two negligence claims: 1) vicarious liability for negligent maintenance; and 2) vicarious liability for failure to warn of a hazard. Carnival filed a motion to dismiss under Rule 12(b)(6) alleging that the claims of actual or constructive knowledge of the risk were merely conclusory and that no facts were alleged that plausibly supported the claim that Carnival had notice of a hazard. Holland alleged that there were frequent prior slip and falls on the same staircase, but he did not allege specific facts about that. Carnival argued that while it was alleged that Carnival employees were nearby, the allegations that it was a high-traffic area and nearby employees could have noticed a wet spot if they were being vigilant was insufficient to properly allege that Carnival had notice. Holland argued that safety regulations showed that the cruise line had constructive notice, but the district court rejected this. Rule 8(a)(2) provides that a plaintiff must make a short and plain statement of the claim, and caselaw has held this to mean that sufficient facts—not just legal theories—must appear on the face of the complaint sufficient to cross the line from a “conceivable” to “plausible” basis for liability. There must be sufficient facts for the court to draw a reasonable inference that the defendant is liable. There must be more than a sheer possibility of unlawful action. Threadbare recitals of the elements of a cause of action and conclusory statements are insufficient. Thus, the first step of evaluating a motion to dismiss is to eliminate any allegations that are merely legal conclusions. The court applied maritime law and distinguished between claims of direct and vicarious liability. To show direct liability, a plaintiff must allege 1) a duty to protect the plaintiff from a particular injury; 2) a breach of duty; 3) actual and proximate causation; and 4) actual harm (damages). The duty of a shipowner toward passengers is to exercise reasonable care toward them. A plaintiff must show actual or constructive notice of a risk-creating condition at least where the menace is not peculiar to ships. This is contrasted with a *vicarious liability* claim. In those claims, when the tortfeasor is an employee, the shipowner can be held liable for the negligent acts of an employee acting within the scope of employment. Plaintiff alleged vicarious, not direct, liability. Without stating that such allegations are strictly necessary, the court noted that Holland failed to identify any specific employee or employees he thought were negligent, and he didn’t articulate how they were negligent within the scope of their employment. (Note: I suppose a good practice would be to identify a specific employee responsible for cleaning the stairs or checking for spills in this case). The court noted that the allegations in the complaint that Carnival owed him a duty of reasonable care and that it had actual or constructive knowledge of the hazard were pertinent to claims of direct negligence, but they were not pertinent to claims for vicarious liability actually brought by Holland. Instead of being guided by the title of the claims (vicarious liability), the court construed them as claims of direct liability for Carnival’s own negligence, not vicarious liability for negligent acts of an employee. But then Holland had to plead specific facts supporting the claim. There was no factual allegation that Carnival actually knew something hazardous was on the stairs. Constructive notice exists where a shipowner ought to have known of a hazard because it was present so long that it invited corrective measures. A plaintiff can survive a motion to dismiss simply by alleging that the defective condition was present for a sufficient period of time to invite corrective measures (even though that seems somewhat like one of the conclusory statements condemned earlier in the opinion). A plaintiff can alternatively allege constructive notice by alleging a pattern of similar past incidents. In sum, Holland alleged that the hazard occurred on a highly trafficked staircase that was potentially visible to many crewmembers and was subject to the regulation of safety agencies. This alleged only a possibility, not a plausibility, of constructive notice. Holland alleged that there were frequent spills and there were prior slip and fall incidents, but this Court found this insufficient because it was conclusory and it lacked any facts concerning a substantially similar accident.

<https://media.ca11.uscourts.gov/opinions/pub/files/202110298.pdf>

Luke v. Gulley—(Per Curiam-Pryor, Rosenbaum and Grant; 11th Cir.; 10/3/22). This is a 1983 case arising from alleged malicious prosecution and illegal seizure for an arrest without probable cause. After a gang shootout between the South Side Bloods and the West Side Rattlers (seriously?), the police received a tip that Mr. Luke was one of the Bloods involved in the shootout. (The driver of the Rattler truck was killed in the shootout, but everyone else involved ran away and no one was apprehended on the date of the shootout). The tip identifying Luke was anonymous, and the tipster described the information as second-hand. The tipster’s description matched a mugshot of Luke. A confidential informant (“CI”) who witnessed the shooting also identified Luke by name. He described actions by Luke and picked Luke out of a photo lineup. He added that the participants had been “trash talking to each other” on Facebook. After some of the participants were arrested, they confessed and confirmed much of the CI’s version of events. While the investigation initially focused on Luke’s brother (another Mr. Luke), the police ruled him out as a suspect and then “deduced” that the CI meant that Luke’s brother, Demetrius Luke. Based on that deduction, an officer obtained a warrant to arrest Luke for murder. A grand jury indicted Luke and others, but three defendants agreed to testify against the other codefendants in exchange for a nolle prosequi—a complete dismissal of charges against them. The State noted that it decided to dismiss the charges because the evidence was insufficient in light of few witnesses being willing to testify. There was also a motion to dismiss where Luke and his fellow Bloods claimed self-defense in response to the attack by the Rattlers, though only the other two men admitting firing shots. The court held a two-day hearing and declined to rule on the claim of self-defense, instead accepting the State’s nolle pros and dismissing all charges. Luke then sued the arresting detective for an illegal seizure under section 1983 and malicious prosecution, and false arrest under Georgia law. The district court allowed a hearing on qualified immunity, and the detective claimed that he relied on the CI’s statement and his determination that the CI meant Luke, not Luke’s brother (which was the actual person that he named). The district court held that the detective was entitled to qualified immunity because while the warrant lacked probable cause, the detective’s full investigation provided probable cause. The court held there was no malice, either. The district court declined to take jurisdiction of the state-law claims. The standard for qualified immunity is clear. Law enforcement officers enjoy qualified immunity from civil claims for discretionary acts that do not violate a federal right that was clearly established at the time of the act in question. Applying for a warrant is a discretionary function. The claimed constitutional right was the Fourth Amendment right to be free from unreasonable seizure as the result of malicious prosecution. Malicious prosecution consists of two elements: 1) violation of a Fourth Amendment right to be free from seizures pursuant to legal process; and 2) the criminal proceedings against the plaintiff terminated in his favor. The first element requires 1) proof that the legal process justifying the seizure was constitutionally infirm; 2) and that his seizure would not be otherwise justified without legal process. In a prior appeal, the Court determined that even though the court did not rule on self-defense and dismissed due to the nolle prosse, the felony murder case ended in a “favorable termination” for Luke. Thus, the only two issues remaining were whether the warrant did not comport with the Fourth Amendment and whether Luke could have been seized without legal process. For a warrant to be valid, the facts in the supporting affidavit must provide probable cause, and it is infirm when the officer who applied for the warrant should have known that his application failed to establish probable cause or that an official, including an individual who did not apply for the warrant, intentionally or recklessly made misstatements or omissions necessary to support the warrant. This standard for malicious prosecution incorporates common law elements of express or implied malice and lack of probable cause. It was undisputed here that the affidavit lacked sufficient information to provide the magistrate probable cause. It only really alleged that Luke killed the driver of the Rattlers’ truck based on the detective’s investigation and eye witness verbal statements, but it provided no details. In regard to whether Luke’s seizure would be justified without the legal process, after 48 hours of detention, it is presumed that the seizure would be unconstitutional without a warrant. Luke was imprisoned for 61 days. There is no way that could have happened without the warrant. The detective’s possession of probable cause based on facts not described in the warrant application can come back around in determining damages, but damages was not yet an issue in the case. And plaintiffs can recover nominal damages for constitutional violations even if they suffer no compensable injury. To recover actual damages, Luke will have to show that but for the detective’s deficient affidavit, he would have been released earlier or would not have faced detention. (NOTE: The court seems to be saying that damages could be defended by claiming that had the warrant been rejected, the detective would have redrafted the affidavit including everything he knew about the case, which would have met the probable cause standard, though the court does not directly make this statement.). The court also noted that the district court erred in applying Georgia law to the 1983 claim. The court had to apply the common law principles that were well settled at the time of the adoption of section 1983. Under that common law, proof of malice could be inferred simply by the absence of probable cause. Modern Georgia law apparently offers no such plaintiff-friendly presumption. The final step in the analysis was whether the unlawfulness of the conduct was clearly established, and the court had no trouble holding that it was. The court cited Supreme Court and Eleventh Circuit precedents from the 1980s that held that where officers seek arrest warrants by using a conclusory and insufficient affidavit, the officer is not entitled to qualified immunity. Oddly, Luke had also raised in the appeal that the district court had erred in denying his own motion for summary judgment, and the Court stated, “In the light of our opinion clarifying the law that governs Luke’s complaint, we express no view on the merits of that motion and leave it for the district court to address in the first instance should Luke choose to renew the motion on remand.” Why Luke has to “renew” a motion that was denied, challenged on appeal, and not affirmed or reversed is entirely unclear except that the remand seems to give him the right to essentially renew or file a successive motion for summary judgment.

<https://media.ca11.uscourts.gov/opinions/pub/files/202210316.pdf>

Norwegian Cruise Line Holdings Ltd v. State Surgeon General of Florida—(C.J. Pryor; 11th Cir.; 10/6/22). In 2020, the federal government published a No Sail Order prohibiting cruise liners from operating at the height of the COVID-19 pandemic. Later in 2020, the Centers for Disease Control issued orders concerning resumption of cruises after COVID-19 vaccinations because available, and those orders required that passengers be fully vaccinated. The State of Florida sued the CDC, arguing that the orders were unlawful. The district court enjoined the CDC from enforcing its order against cruise ships at Florida ports. The CDC appealed but later voluntarily dismissed the appeal. In July 2021, the CDC approved an application by Norwegian to resume cruise operations under a plan that stated at least 95% of passengers and crew would be fully vaccinated. Florida’s governor, Ron DeSantis, then issued an executive order barring businesses from requiring proof of vaccination. The Florida legislature then codified that executive order. The sponsor of the bill condemned what he called “discrimination” against those who refuse vaccines, calling them a “minority population.” Norwegian wanted to promise customers 100% vaccination rates on cruises, and Norwegian sued the Florida Surgeon General from enforcing the new statute. Norwegian brought a First Amendment claim and also argued that the state’s regulation burdened interstate commerce in violation of the Dormant Commerce Clause. Many non-Florida ports such as Belize, the Bahamas, British Virgin Islands, and Honduras required 100% vaccination to dock. Those ports dropped those requirements while the appeal was pending. The district court enjoined the State from enforcing the statute, and the State appealed. The Eleventh Circuit reversed the injunction, all but dooming the merits of the appeal in a 55-page opinion. The court held that Norwegian was unlikely to succeed on the merits of the First Amendment claim because the statute regulated conduct (checking vaccine cards), not speech. The Eleventh Circuit bought into Florida’ characterization of the statute as an “anti-discrimination” statute, noting that such statutes normally regulate non-expressive conduct and have either no burden or an incidental burden on speech. The court also held that Norwegian is unlikely to succeed on the merits of the Dormant Commerce Claim because the effect on interstate commerce was only incidental. The State’s interest matters traditionally left to the states outweighed any impact on interstate commerce. “Florida’s interest in protecting the unvaccinated from discrimination—not generally promoting its economy—is legitimate.” The Court was persuaded that medical privacy was a factor. The court also cited precedent for honoring state statutes that protect “safety.” Noting that the dissent scoffed that an anti-vaxxer statute promoted public safety, the majority answered that it was designed to protect anti-vaxxers’ economic health and safety by making sure businesses couldn’t turn them away. Judge Brasher joined Chief Judge Pryor’s opinion. Judge Rosenbaum DISSENTED, stating that the statute is unconstitutional. He laughed off the attempt by the majority to call an anti-vaccination statute that a statute that promotes public safety and health, stating that the only way the statute touches on public safety “is to wallop it,” and that the statute was the “exact opposite of a law” promoting health and safety. The full dissent is 68 pages. Again, this opinion was just about the injunction, so whether Judge Rosenbaum’s dissent can turn the tide in the review of the merits remains to be seen. <https://media.ca11.uscourts.gov/opinions/pub/files/202112729.pdf>

**First DCA**

Aberman v. Ford, Miller & Wainer, P.A.—The Ford firm sued their client, alleging $6,500 in legal bills had not been paid. They attempted to serve Aberman for months without success and finally filed a sworn statement attaching a process server’s verified return of non-service under section 49.031, Fla. Stat. Aberman’s addresses were vacant. Thus, the firm served him by publication. When he still did not respond, the firm obtained a default judgment. Within 10 days, Aberman magically appeared and moved to vacate the default and to file an answer and affirmative defense. He claimed he’d been unaware of service and that he had paid his bill in full. The answer was unverified, and he filed no affidavits supporting his motion to vacate the final judgment. While he argued that his due process rights were violated by use of constructive service by publication and while he alleged that the Ford firm had not done a diligent search, he did not expressly argue that the trial court lacked jurisdiction. A defendant wishing to contest personal jurisdiction must do so in the first step taken in the case, or the issue is waived. Even entering a general appearance waives the right to contest personal jurisdiction. In this case, his arguments waived the personal jurisdiction issue. In regard to the motion to vacate the default, there is a requirement for liberality in vacating defaults, and resolution on the merits is preferred, but denial of a motion to vacate is reviewed for abuse of discretion. The motion failed to set forth facts showing that his failure to respond was due to excusable neglect. He was diligent in quickly responding, and he alleged a meritorious defense, but the explanation that he was unaware of service was deemed too “terse” and general to lead the DCA to find an abuse of discretion. A general assertion, without more factual development, is insufficient to establish excusable neglect. (Note: The DCA does not explain what more one could say to allege that you *didn’t* know about something. It seems awfully close to having to prove a negative. The court noted in a parenthetical that affidavits are required to set forth facts, and that seems to be determinative here. There was no affidavit, so there is no abuse of discretion in finding a lack of excusable neglect). Affirmed. <https://www.floridasupremecourt.org/content/download/850548/opinion/222450_DA16_10062022_104300_i.pdf>

Burns v. Turnage—(J. Jay; 1DCA; 10/6/22). This is a fee dispute arising from a personal injury case. Burns sued Turnage after a car accident. Turnage made a $60,000 pretrial proposal for settlement, and Burns rejected it. Burns won only $40,827.28 at trial. There was a setoff of $32,515.66, so the court entered a judgment for $8,311.62. Turnage than moved for attorney’s fees because Burns won less than the proposal for settlement. Burns stated that the PFS did not trigger a right to fees and costs because it had been ambiguous in that it did not state its conditions and nonmonetary terms with particularity because it did not allow Burns to know which claims and parties she would be releasing by accepting the offer. The trial court sided with Turnage, and Burns appealed fee entitlement (but did not appeal the amount of the fee). The DCA noted that review of a ruling on motion for fees and costs under section 768.79 is *de novo*.

To comply with section 768.79, a settlement offer must:

(a) Be in writing and state that it is being made pursuant to this section.

(b) Name the party making it and the party to whom it is being made.

(c) State with particularity the amount offered to settle a claim for punitive damages, if any.

(d) State its total amount.

§ 768.79(2), Fla. Stat. The statute provides that the offer “shall be construed as including all damages which may be awarded in a final judgment.” Id. Florida Rule of Civil Procedure 1.442(c)(2) follows and builds upon the statute’s requirements. The version in effect at the time stated that a proposal shall:

(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;

(B) state that the proposal resolves all damages that would otherwise be awarded in a final judgment in the action in which the proposal is served, subject to subdivision (F);

(C) state with particularity any relevant conditions;

(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;

(E) state with particularity the amount proposed to settle a claim for punitive damages, if any;

(F) state whether the proposal includes attorneys’ fees and whether attorneys’ fee[s] are a part of the legal claim; and

(G) include a certificate of service in the form required by Florida Rule of General Practice and Judicial Administration 2.516.

The settlement offer directly tracked Rule 1.442 even using the lettered paragraphs. The proposal identified two nonmonetary terms: (1) Burns would sign the attached release and (2) Burns would dismiss with prejudice her lawsuit against Turnage. The attached release additionally stated that Burns would release Turnage “from any and all claims, demands, damages, causes of action or suits of any kind or nature whatsoever” that arose out of the accident. The DCA noted that misspelling Kelley (leaving out the second “e”) was a typographical error that was immaterial to the analysis. The DCA saw nothing ambiguous about the PFS. There was no reasonable way to read the language as a proposal to settle some but not all claims arising out of the accident or to settle claims unrelated to the accident, which would be impermissible. Addressing punitive damages even though the complaint had not sought such damages was reasonable because Rule 1.442 requires an offer to state the amount proposed to settle punitive damages claims. The fee order was affirmed. <https://www.floridasupremecourt.org/content/download/850535/opinion/211246_DC05_10062022_100557_i.pdf>

Gjokhila v. Seymour—(J. Jay; 1DCA; 10/6/22). In this family law appeal, a mother attempted to challenge the trial court’s adoption of a mediated agreement between the parties when her earnings did not measure up to what she had anticipated that they would be back at the mediation. She challenged the court’s imputation of future income under the relevant statute (despite agreeing to it at mediation) by filing a Rule 1.540(b)(1) motion. That rule allows a party to challenge an order entered due to “mistake, inadvertence, or surprise.” The rule is materially identical to Rule 12.540(b)(1) under the Family Law rules. There are two important aspects for all civil practitioners here. First, Florida Supreme Court precedent holds that a court’s legal errors such as a mistaken view of the law cannot be corrected under the rule. That would make the rule a substitute for the appellate process. The court, however, noted that the United States Supreme Court in a 2022 decision called Kemp just made the opposite holding for the federal rule of procedure, Rule 60(b)(1). In federal court, a “mistake” can include a judge’s error of law. The First DCA noted that there was great textual overlap between federal rule 60(b)(1) and Florida Rule 1.540(b)(1). The court openly noted that Kemp could result in Florida changing its rule and allowing arguments about a judge’s mistake of law via a 1.540(b)(1) motion. In the family law case before it, however, it simply did not matter because the court made no mistake of law *or* fact; it simply adopted a consent judgment created by the parties themselves. Even if it had been error, it would be invited error induced by the Mother asking the court to adopt the consent judgment.

<https://www.floridasupremecourt.org/content/download/850538/opinion/211613_DC05_10062022_101052_i.pdf>

State of Florida v. Anderson—(Per Curiam; 1DCA; 10/6/22). This short little opinion clarifies that the “written order” necessary to initiate an appeal can be an order, judgment, decree, or rule of a lower tribunal, but it cannot be a signed version of the trial court’s minutes or a minute book even if those minutes note the outcome of a hearing or a ruling. Oral pronouncements memorialized only in written minutes cannot be appealed. They are not an order.

<https://www.floridasupremecourt.org/content/download/850536/opinion/211297_DA08_10062022_100755_i.pdf>

Summerlin v. L3 Communications Integrated Systems, LP—(J. Jay; 1DCA; 10/6/22). This is a mixed but mostly-good bag for plaintiff’s attorneys. Summerlin filed a third amended complaint alleging that she was the victim of “associational discrimination” under Title VII, the ADEA and the ADA and for retaliation under Title VII. She alleged “marital status” and “association” as the basis for discrimination. 42 U.S.C. § 12112(b)(4) prohibits an employer from discriminating against a “qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” Summerlin alleged that she filed a charge of discrimination with the Florida Commission on Human Relations and the EEOC and alleged that she timely filed her suit, but she did not attach the charge of discrimination to the complaint. Appellee moved to dismiss for failure to attach the document to the complaint as proof that she exhausted her administrative remedies. She responded that the document did not give rise to the claim, did not need to be attached, and failure to attach it could not be raised in the motion to dismiss because the document was not mentioned in the four corners of the complaint. The trial court dismissed the claims with prejudice. U.S. Supreme Court precedent holds that the presuit administrative exhaustion requirement of filing with the EEOC is not jurisdictional. Like a statute of limitations, a failure-to-exhaust defense is subject to waiver, estoppel, and equitable tolling. All a plaintiff has to do under Rule 9(c), Fed. R. Civ. P. is to allege generally that all conditions precedent have occurred or been performed, which Summerlin did. Rule Appellee 1.120(c), Fla. R. Civ. P. is the state-level equivalent. The Defendant alleged, however, that Rule 1.130(a) requires that certain instruments be attached to or incorporated into the complaint or answer if they are documents “on which action may be brought or defense made.” That language refers to documents where the action is derived from the instrument itself. Plaintiff was right; she was not suing based on the charge of discrimination filed with the EEOC and FCHR. She was suing based on the discrimination itself. The court reversed and remanded for further proceedings on the two claims, affirming dismissal of the other claims that were not analyzed without further discussion.

<https://www.floridasupremecourt.org/content/download/850542/opinion/213561_DC08_10062022_102309_i.pdf>

**Second DCA**

State Farm Mutual Automobile Insurance Company v. Athans Chiropractic, Inc.—(J. Kelly; 2DCA; 10/7/22). This case serves as a warning to plaintiffs’ attorneys. The insured in this case was a woman named Micaela Falabella. She assigned rights relating to her auto insurance claim to Athans Chiropractic and there were apparently multiple assignments perhaps for multiple chiropractic sessions. During the litigation in the circuit court, Athans’ attorneys—FL Legal—became aware that Athans had settled the whole claim by using different attorneys apparently in regard to a different set of bills that stemmed from Ms. Falabella’s claim. Athans’ attorneys, FL Legal, then shifted their strategy to sue State Farm for settling the claim without protecting FL Legal’s lien rights for attorney’s fees. FL Legal filed discovery requests to compel State Farm to produce its claim and litigation files and underwriting information pertaining to Athens’ claim and information about the earlier settlement. State Farm objected that the discovery requests sought information protected by attorney-client and work produce privileges and was not relevant because FL Legal had no lien rights and was not a party to the action. The trial court granted the discovery request. State Farm then petitioned the DCA for a writ of certiorari to quash the discovery orders. Ordinarily, certiorari is not a proper vehicle to attack a discovery order on relevance grounds, but the DCA cited 1957 precedent for the propositions that 1) a litigant is not entitled “*carte blanche* to irrelevant discovery,” and 2) an order that entitles a party to *carte blanche* discovery of irrelevant material may be attacked by cert petition. (NOTE: For our non-Franophiles, “carte blanche” is French for “blank document” or “blank check,” which simply is a metaphor for something that is unlimited like a personal check written to someone with the amount left blank for them to fill in with whatever number they want. So…the ability to do anything one wants.) The DCA did not discuss what separates a run-of-the-mill order for irrelevant information from an order that compels “carte blanche” discovery into an irrelevant area, but the key fact here was that the DCA agreed with State Farm that the record “affirmatively shows” that no charging lien exists and that there was no basis for discovery, so any discovery constituted an irreparable harm. (NOTE: I’ll admit…this opinion seems odd to me. It feels like a challenge to a discovery order masquerading as review of denial of an unfiled motion to dismiss for failure to state a claim…something that could be reviewed on direct appeal. The difference between normal irrelevant discovery which *cannot* be challenged on cert and “carte blanche” discovery which *can* be challenged by cert seems extremely hazy. The key fact was not the broad scope of the discovery; it was the DCA’s certainty that no legal basis for asserting a charging lien exists. Which has nothing to do with the scope of discovery; it has to do with the failure to state a valid legal claim for relief). The Court reviewed what a “charging lien” is. It is an equitable right to have costs and fees due an attorney ***for services in the suit*** secured to him in the judgment or recovery in that particular suit. Athans had two sets of attorneys pursue different bills in the same case without informing FL Legal that it was doing so. The fact that there were two different cases for the same assignees meant, to the court, that no lien could exist because FL Legal did not appear “in the suit” between Athans and State Farm for the other set of bills. (NOTE: This seems wildly wrong. First, there have been a flurry of cases recently affirming that an assignee with an assignment of benefits merely steps into the insured’s shoes. If that is true, then there was one accident, one insured, and should be one “suit” regardless of whether multiple complaints were filed. Second, the settlement in the prior case extinguished rights in the second case, which seems like a pretty good argument that it was the “same suit.” If they were separate, the first would not have extinguished the second.) Athans could have sued State Farm for breach of contract for all of its unpaid medical bills in Ms. Falabella’s claim, but filing two lawsuits in the case same case through different attorneys relating to different bills for the same claim, in the DCA’s view, created multiple “suits” that could be settled independently of each other with no notice to the firm handling the other related bills. The court then noted that to perfect a charging lien, timely notice is required, and FL Legal had to have perfected its lien by filing a notice of lien or otherwise pursue the lien in the original action. FL Legal argued that it had a charging lien by virtue of the fact that it sent a presuit demand letter to State Farm regarding the claim where it asserted that it had a “continuous and ongoing lien with respect to any claim asserted in this demand letter.” But the Court held that FL Legal did not “file its demand in the original action, thus it did not timely perfect its claimed lien.” FL Legal argued that it was fraud for State Farm and presumably its own client, Athans, to conduct litigation in the same claim without notifying FL Legal that another law firm was pursing the claim on Athans’ behalf. The DCA rejected this because FL Legal did not appear “in the litigation and provided services for which they were owed a fee.” (NOTE: The Court seems to be saying that FL Legal would have had to appear in the litigation not just in its own case but also in the *other* case that they knew nothing about. This seems like a Catch-22. It’s unclear how they could appear in that litigation without being informed about it. Perhaps the DCA’s thinking in this case was that FL Legal needs to sue its own client, Athans, not State Farm, who merely settled a case with Athans through their own attorney. Athans’ left hand not knowing what the right hand was doing was a problem that existed all on the plaintiffs’ side of the fence and State Farm perhaps did nothing wrong. But the court does not state this directly. The court does not seem to foreclose a suit by FL Legal against its own former client.) In the end, perhaps much of the opinion is *obiter dictum*. What the court actually held was that it granted a petition for certiorari to quash a discovery order on relevance grounds. But this should be a warning to plaintiff’s attorneys to 1) not just send but to “file” charging liens; 2) perhaps add contract provisions with clients where they assert that they have disclosed the existence of any prior litigation in the case and any firms they have previously hired relating to the matter and consider contract language that protects against the situation in this case).

<https://www.floridasupremecourt.org/content/download/850588/opinion/211518_DC03_10072022_083256_i.pdf>

**Third DCA**

D’Albissin. V. Florida Fish and Wildlife Conservation Commission—(Per Curiam-citation PCA; 3DCA; 10/6/22). This is another case stating that a three-strikes-and-you’re-out rule is not written in stone—there is no magical number of amendments that are allowed—but after allowing three attempts to amend a complaint, a dismissal with prejudice is generally justified.

Griffin Windows and Doors, LLC v. Pomeroy—(J. Hendon; 3DCA; 10/6/22). Pomeroy sued Griffin Windows, and Griffin Windows made a settlement offer/offer of judgment under Rule 1.442 and section 768.79. Pomeroy rejected the settlement officer, proceeded to trial, and struck out. The jury found no liability for Griffin. Griffin pursued fees in the trial court, but because Pomeroy had appealed the final judgment, the judge stated that he or she (the judge is not named) wanted to delay the fee hearing until after the appeal concluded. Griffin requested that the fee hearing go forward and then, if Pomeroy wanted to challenge the fee order, he would have to post a supersedeas bond. The trial court still opted to hold off until after the appeal, and Griffin noted on the record that it did not object to an order granting entitlement but reserving the amount until after the appeal. The trial court entered such an order. Afterwards, Griffin changed its mind and filed a motion for reconsideration, arguing that the pending appeal did not divest the court of jurisdiction to award fees and that even though a successful appeal might moot the fee order, the court had a ministerial duty to act in response to the fee motion. The motion to reconsider was denied. Griffin filed a petition for a writ of mandamus. To obtain such a writ, Griffin had to demonstrate a clear legal right to performance of a ministerial duty and no other method of obtaining relief. A writ of mandamus can issue to require a timely ruling on a matter pending before a lower tribunal. The court issued the writ and instructed the court to hold a fee hearing and enter a final order. (NOTE: It was interesting that the court took the trouble to recount how Griffin agreed to the order to delay consideration of the fee matter without exploring if that stipulation waived the objection. Griffin is extremely lucky that the court did not find waiver and then a failure to appeal or file a petition for cert relative to the order entered after the first fee hearing.)

<https://www.floridasupremecourt.org/content/download/850530/opinion/221069_DC03_10062022_103957_i.pdf>

Hochman Family Chiropractic, Inc. v. Allstate Fire & Casualty Insurance Company—(Per Curiam-citation PCA; 3DCA; 10/6/22). Allstate's PIP policy provides legally sufficient notice of Allstate's election to use the permissive Medicare fee schedules identified in section 627.736(5)(a)(2) to limit reimbursements. <https://www.floridasupremecourt.org/content/download/850487/opinion/210342_DC05_10062022_100632_i.pdf>

The Personal Injury Clinic, Inc. v. Allstate Fire & Casualty Insurance Company—(Per Curiam; 3DCA; 10/6/22). The Personal Injury Clinic is a medical provider that received an assignment of benefits (“AOB”) from an insured. A policy can provided sufficient notice that am insurer will pay only the amounts set forth in the permissive fee schedule under section 627.736(5)(a)(2), but the portion of the summary judgment order in the case that held that Allstate actually paid those amounts had to be reversed because the record did not include an affidavit or other summary judgment evidence of payment. <https://www.floridasupremecourt.org/content/download/850497/opinion/210346_DC08_10062022_102056_i.pdf>

Schuler v. Sandy T. Fox, P.A.—(J. Lindsey; 3DCA; 10/6/22). This is another case of a law firm suing a former client for failure to pay legal bills. This time, the amount was just under $60,000 related to a paternity action. Interestingly, the amounts sought were about $40,000 per the contract between the parties, but the remaining $18,500 was for “equitable relief for services rendered in the appeal in the paternity action.” The firm obtained a default judgment for the full amount in early 2016. Nearly five years later—in late 2020—the law firm filed two motions for writs of garnishment directed at two of Schuler’s bank accounts. In November 2020, Schuler filed a motion to quash service of process and to vacate the 2016 default judgment. He argued that he was never served; he argued that the process server served someone other than himself, and he cited the process-server’s description, which differed from the process server’s description of the person served in 2016. He also argued that it was improper to enter judgment without a trial on damages and 30 days’ notice of a claim for unliquidated damages, which is required under Rule 1.440(c). The trial court held that the $40,000 for the contract damages were liquidated damages, and the judgment was valid and enforceable. In regard to the other $18,500, though, the court vacated the damages for unjust enrichment and *quantum meruit* because they were unliquidated damages and the defendant had not been served with an order setting the trial. At a second hearing, the trial court took up the matter of whether Schuler was properly served. He and his girlfriend testified that he was living in Chicago at the time that someone served a person at his old Florida address, and he also introduced a power bill showing that the electricity had been turned off at his Florida address by November 15, 2015, two days prior to service. The process server testified and said that someone at the address identified himself as Schuler. The process server introduced photographs showing a black SUV that resembled Schuler’s vehicle and a moving trailer. Schuler responded that his friend, Brian, packed the moving trailer and drove his stuff to Illinois. The firm introduced Schuler’s debit card records showing charges in and around Schuler’s residence between November 12 and 17, 2015. Schuler claimed that he’d given his debit card to “Brian,” but no one named Brian appeared at the hearing. The trial court found that in light of the evidence of the debit card charges, there was not clear and convincing evidence that he was not the person served. He did not find Schuler or the girlfriend credible. Schuler appealed. The DCA first discussed the liquidated damages issues. A default final judgment is **void** if it awards unliquidated damages without first providing proper notice of the damages trial per Rule 1.440(c). The difference between liquidated and unliquidated damages is whether the exact amount of damages can be determined from the pleadings either through a pleaded agreement by the parties, an arithmetical calculation, or application of definite rules of law. Damages are *unliquidated* if figuring out the sum requires testimony and a value judgment. Here, the exact amount of the fees could be determined from the Complaint and attachments, which included the fee agreement and invoices. The court rejected the argument that attorney’s fees are always unliquidated. Claims for the reasonable value of services is a claim for unliquidated damages, but not all fee orders require a reasonableness determination. When fees are sought as compensatory damages against a client for breach of an hourly rate contract as opposed to reasonable (prevailing party) fees, no independent expert testimony regarding reasonableness is necessary. The fees in this case were determined by the hourly agreed rate times the number of hours minus the amounts already paid. No evidentiary hearing was necessary. Thus, the portion of the order declining to vacate the fees as unliquidated was affirmed. In regard to whether the default had to be vacated because of lack of service, section 48.21, Fla. Stat., lists all the factors that must be listed on the face of the return of service for it to be considered regular on its face. The written description of the person served was not one of the required items for a return of service, so any variation in the description of his appearance did not render the return of service irregular on its face. Where there is a return of service that is regular on its face, to prove service did not occur, the movant must do so by clear and convincing evidence. The court affirmed based on the trial court’s credibility determination and the fact that the court did not abuse its discretion in finding that Schuler failed to put forth clear and convincing evidence that he was not the person served.

<https://www.floridasupremecourt.org/content/download/850498/opinion/211633_DC05_10062022_102221_i.pdf>